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THE RULE OF RECOGNITION AND THE CONSTITUTION

*Kent Greenawalt**

I. INTRODUCTION

This essay is about ultimate standards of law in the United States. Not surprisingly, our federal Constitution figures prominently in any account of our ultimate standards of law, and a discussion of its place is an apt jurisprudential endeavor for the bicentennial of the constitutional convention. Although in passing I offer some comments on constitutional principles, this essay is not about how the Constitution, or indeed other legal materials, should be understood and interpreted. Rather, it attempts to discern the jurisprudential implications of widespread practices involving the Constitution and other standards of law.

The ambitions of the essay are most easily explained in terms of its origins. For many years, I have taught students in jurisprudence courses the central themes of H.L.A. Hart's *The Concept of Law*.¹ Among the most important themes is the idea of a rule of recognition, which expresses a society's ultimate criteria for what counts as law. Rejecting John Austin's claim that commands of a sovereign are the ultimate standard of legality, Hart writes of a rule of recognition, a test accepted by officials for determining what normative standards are part of the legal corpus.² Each time I have asked students what the rule of recognition is in the United States, the answer has seemed more difficult and complex.

My attempt to deal with this intellectual puzzle in a systematic way is the root of this essay; I offer here a fairly comprehensive account of how one might try to state a rule of recognition for someplace

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I am enormously grateful to H.L.A. Hart, whose careful critical comments on two previous drafts helped prevent confusion and imprecision and opened up avenues for examination. I want also to thank Bruce Ackerman, Meir Dan-Cohen, Stephen Massey, Henry Monaghan, David Morris, and Stephen Munzer who gave me helpful comments on earlier drafts, and Daniel Alter and Brad Theis, who provided research assistance. I also profited from discussion of the paper by the New York University Law and Philosophy Colloquium.

1. H.L.A. HART, *THE CONCEPT OF LAW* (1961) [hereinafter *THE CONCEPT OF LAW*].

2. See *id.*, especially at 97-120.

in this country.³ My aims in this respect are primarily analytical and pedagogical, to demonstrate what critical issues are and what approaches are needed to resolve them. My method is also pedagogical in a special way. I sometimes offer a first approximation for resolution of a particular problem, leaving aside complexities. Once those complexities are explored in a related context, I return to the original problem for a more complete resolution. This strategy has drawbacks for the resolution of any particular issue, but it permits a more logical unfolding of stages of analysis.

The analysis, which illuminates intriguing and rarely discussed features of the American legal order, certainly dispels any illusion that the rule of recognition for the United States can be reduced to any simple statement, such as "The federal Constitution is our rule of recognition." I demonstrate that the rule of recognition will have a number of standards and be quite complex, omitting some of the federal Constitution while including aspects of state law and interpretive standards used by judges. Although I make tentative choices among alternative hypotheses about a rule of recognition, I do not undertake the extensive historical or legal research that would be needed to make fully considered judgments about every troublesome question.

In applying what Hart says to our complicated legal order, I have progressively grasped some of the effort's broader implications for Hart's own theory and for divergencies between that theory and its main competitor. It was not until I had struggled with these matters for some time that I realized more was involved than applying Hart's basic theory to an extremely complicated legal reality. Aspects of that reality proved recalcitrant in the face of Hart's categories; the conceptual possibilities and relationships among standards proved richer than one would gather from *The Concept of Law*. At this point, the second ambition of the essay emerged: to amplify Hart's basic idea of a rule of recognition so that it could apply without distortion to the United States. In the course of trying to discern the rule of recognition for the United States, I show, among other things, how uncertain the ultimate standards of law may be in a stable legal system; how the ultimate standards may shift unnoticed over time; how the precise relationship between the "ultimate rule" and "supreme criterion" may vary from the one Hart supposes; and how the interaction between acceptance and higher norms may have a level of complexity greater than he imagines.

3. I use the word "someplace" because, as will subsequently be made clear, the ultimate rule of recognition is different in each state.

For some time I supposed that I could rest with developing and applying to the United States a somewhat enriched account of Hart's approach, leaving for others the overall adequacy of such an account in light of challenges made to it, most notably by Ronald Dworkin.⁴ But I came to understand both that some of the problems with discovering the rule of recognition for the United States could not be resolved without reference to those challenges and that the concrete effort at application provided a valuable window for assessing important disagreements between Hart and Dworkin. Much of the best writing about Dworkin's disagreements with Hart over ultimate standards of law has been general and at a high level of abstraction.⁵ Though something may be lost by concentrating on the details of a particular legal system, as this essay does, attention to such details clarifies much of what is at stake by illustrating competing possibilities in a familiar context. The exercise of applying Hart's approach to the United States shows why one needs to draw from basic insights of both Hart and Dworkin to reach a satisfactory theoretical understanding about American law.

The essay thus proceeds at three levels: (1) application to the United States of Hart's concepts regarding the rule of recognition; (2) enrichment of those concepts in light of this country's law and legal institutions; (3) evaluation of some strengths and weaknesses of this general approach to how ultimate legal standards are discerned, and a sketch of a fuller and more adequate account. The main body of the essay is primarily addressed to the first level, though it involves comments of obvious relevance for the second level and lays the groundwork for discussion at the third. Only near the end of the paper do I draw together my conclusions about how Hart's theory requires amplification and treat the relevant disagreements between him and Dworkin in a systematic way. In order to help the reader see how the details of application to the United States of the idea of a rule of recognition relate to the more abstract jurisprudential issues, I begin by briefly summarizing Hart's theory and the core of the challenge to it and by circumscribing the plausible range of disagreement.

Before embarking on that endeavor, I want to offer the reader, es-

4. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-130, 338-53 (1978 ed.) [hereinafter *TAKING RIGHTS SERIOUSLY*]; R. DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter *LAW'S EMPIRE*]; Dworkin, *A Reply*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247 (M. Cohen ed. 1984) [hereinafter *A Reply*].

5. See, e.g., J. RAZ, *THE AUTHORITY OF LAW* (1979); Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977).

pecially one not closely familiar with the relevant literature, two cautions. The first is that I employ terms like "rule of recognition" and "supreme criterion" in a technical way, following Hart's understanding since I am exploring the implications of his theory. I am not trying to defend the meanings he assigns as the only or best possible meanings of those terms. The reader who entertains different meanings will have to remember that my claims about application are only about the concepts Hart uses, not about every meaning that could be assigned to the key terms.

The second caution is that my effort here involves conceptual clarification. Insofar as theoretical clarifications dispel confusion they may have some indirect practical influence, but I have no practical point to make here about how actors in the legal system should interpret the Constitution or other legal materials. Of course, it is possible that at some subconscious level practical aims are driving my attempt at theoretical understanding, and it is almost certainly true that no attempt at understanding the nature of social institutions is wholly compartmentalized from the social world one would like to see. But the reader who is looking for theory that has some meaty and straightforward practical significance, who is ill-disposed to conceptual elaboration for its own sake, is bound to be extremely disappointed by what follows and would be well advised to stop here.

II. HART'S CONVENTIONALIST ACCOUNT OF LAW AND THE NORMATIVE CHALLENGE TO IT

According to Hart, societies with advanced legal systems have criteria for distinguishing authoritative legal norms from norms that do not have legal status. These tests or criteria need not be understood by the general populace; they are employed by officials. To state for a particular society what the criteria of law are, and the hierarchy in which these criteria stand to each other, is to describe the standards that recognized officials now accept.⁶ The reconstruction of the practices of officials tells us what the standards are for law in a society.

When societies experience revolution, sharp conflict may exist over who exercises official authority; and in some societies officials may be guided in their actual decisions by "authorities" (such as party offi-

6. At first glance, this account may seem to involve a troubling circularity, since officials determine what are the standards of law and they derive their official status from the law. The break in the circle is that one looks to the population at large to see who are recognized as officials. Ordinarily, people's judgments about who are officials may rely on certain assumptions about conformance with legal standards, such as election laws, but people need not understand the complex criteria judges and other officials use to determine what counts as law.

cials) that they do not publicly acknowledge as having the power to determine what is valid law. As Hart does for the most part,⁷ I shall disregard these possibilities and concentrate on a stable legal order in which the criteria that officials purport to follow are those they generally do regard as authoritative.

In explaining the ultimate rule of recognition, Hart supposes that a question is raised about the validity of a local ordinance.⁸ Americanizing the illustration, we might ask if what is claimed to be a housing regulation was adopted by the city council; if so, whether the city charter gave such power to the council; if so, whether the state legislature gave such power to the city government; if so, whether the state constitution gave such power to the state legislature; if so, whether the federal Constitution authorizes, or allows, the exercise of such power by the states. At each early stage in the process, we can refer to a higher standard that validates the lower standard for determining whether the rule counts as law. Finally, however, we reach a point at which the effect of a standard does not depend on a higher standard that we can refer to; all we can say is that this standard for determining law is accepted in the society. When we arrive at such a standard, we have reached the ultimate rule of recognition. That rule does not derive validity from a superior legal rule, it owes its status as law to its acceptance by officials.

Hart's discussion of the ultimate rule of recognition includes an account of a "supreme criterion" which is all or part of the ultimate rule:

[A] criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme criterion.⁹

Since Hart's phrase, "the rule of recognition," can be the source of confusion, we need to be clear about how he is using the term. First, "rules" are often thought of as imposing duties. The rule of recognition, which sets out criteria for identifying law, does not tell people in any simple way how to act, though it may be "duty-imposing" in the

7. Hart discusses revolution in *THE CONCEPT OF LAW*, *supra* note 1, at 114-15. He suggests, *id.* at 68, that if an official habitually obeys someone else, that does not mean the person he obeys has legal authority; but Hart does not address a society in which the authority of those outside the legal hierarchy is generally acknowledged and has some legal support, as the authority of Communist Party members may be recognized in Communist countries.

8. *Id.* at 103-04.

9. *Id.* at 103.

more complex sense of setting standards for how officials perform their functions.¹⁰

Second, nothing in the basic term "rule of recognition" necessarily suggests ultimacy; one could comfortably speak of the conferral of legal authority upon cities by a state legislature as a "rule of recognition," though the state legislature's power is itself derived from the state constitution. As a criterion courts would use to identify valid city law, the conferral of authority by the state legislature might be called a derivative rule of recognition. Hart, however, reserves the words "rule of recognition" to refer to ultimate standards for identifying law; in *his* terminology, a standard that can be derived from another legal standard is not part of the rule of recognition. To minimize possible confusion I follow him here, using other terms when I refer to derivative criteria.

Third, Hart is clear that the ultimate standards for identifying law may include quite separate strands. One might wish to speak of each of these as an independent rule, together comprising the ultimate *rules* of recognition.¹¹ Though Hart occasionally falls into using the plural "rules of recognition" in this way,¹² for the most part he intends the singular "rule of recognition" to include every ultimate standard for determining law in a particular political society. Again, for simplicity's sake, I adhere to his terminology.

Hart's account is conventionalist. What counts as law depends ultimately upon prevailing social practices, that is, what officials take as counting as law. If a judge or other official were to try to determine the law, he would implicitly employ the rule of recognition and what can be derived from it. If a sociologist were trying to describe the legal system, he would use the rule of recognition both to identify the corpus of law and to conceptualize how officials determine what is law. In calling the rule of recognition a social rule, Hart means more than that the rule expresses a convergence of perspectives officials happen to take about what is law. The rule must be "effectively accepted as common public standards of official behaviour by [a system's] officials."¹³ Part of the *reason why* officials use the rule is because they conceive it as representing a shared social practice upon which expectations are built.

10. See N. MACCORMICK, H.L.A. HART 113-15 (1981); J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 198-99 (2d ed. 1980).

11. See J. RAZ, *supra* note 10, at 200.

12. See, e.g., THE CONCEPT OF LAW, *supra* note 1, at 92.

13. *Id.* at 113. This aspect of the rule of recognition is explored in depth by Gerald Postema, *supra* note 5. On the notion of social rules, see N. MACCORMICK, *supra* note 10, at 29-44.

Hart usually speaks as if the main features of the rule of recognition and most of its applications will be reasonably straightforward. He clearly does not think the rule of recognition must include standards of morality, and it is probably fair to say that among the advanced legal systems in which he is primarily interested, Hart does not believe standards of morality will be among the rule's most important features.¹⁴ For issues raised about the law that are not settled by reference to the rule of recognition or derivations from it, Hart talks as if a judge or other official has discretion, that is, a kind of legislative choice how to apply a vague standard to concrete facts or how to fill in an open gap in the rule of recognition itself or in one of the standards that derives from it.

Mainly addressing the role of judges in common-law systems, Ronald Dworkin has challenged the sharp distinction Hart draws between validity based on derivation from higher standards and the acceptance on which ultimate standards rest. Dworkin points out that even in Hart's theory the legal force of a particular claimed custom will depend partly on its acceptance;¹⁵ more important, the vast number of principles, such as "no one should profit from his wrongdoing," that figure in adjudication depend not on prescription by a single authoritative act but on vague facts of institutional acceptance.¹⁶ Since many of these "legal" principles will replicate or closely resemble moral principles, Dworkin's account draws a much less sharp distinction than Hart's between standards of law and moral standards. Further, Dworkin claims that the reach of legal duty extends to cases that are not resolved by any socially accepted rule of recognition; the judge deciding difficult cases must *as a matter of law* undertake (explicitly or implicitly) a complex exercise in interpretation, seeking to develop and apply the soundest theory of law.¹⁷ Dworkin's more recent writings make plain that though soundness is partly a matter of fit with legal materials, the judge interpreting the law will make important in-

14. Moral standards, however, might figure into a full account of the authority of precedent or custom. That would be so if a precedent judged to have morally unacceptable applications had less force in some sense than other precedents or if a custom could have legal authority only if morally acceptable. Hart says that "reasonableness" is one test of whether a custom has legal status in England. *THE CONCEPT OF LAW*, *supra* note 1, at 46. Presumably one way in which a custom could be unreasonable would be by being morally reprehensible.

Hart also says that in countries like the United States, the ultimate criteria of legal validity "explicitly incorporate principles of justice or substantive moral values." *Id.* at 199. Whether this observation is actually faithful to Hart's own account depends on how the relation between the federal Constitution and the rule of recognition is conceptualized, a subject treated in section IV *infra*.

15. See *TAKING RIGHTS SERIOUSLY*, *supra* note 4, at 41-43.

16. *Id.* at 39-44.

17. See, e.g., *id.* at 46-130; *LAW'S EMPIRE*, *supra* note 4.

dependent judgments of political and moral philosophy — independent in the sense of not being determined by the legal materials themselves.¹⁸ The reason a judge employs a particular interpretive theory is because it seems soundest, not because it is socially accepted. In contrast to a conventionalist account, Dworkin offers a normative or interpretive account. The judge's final standards of what constitutes law are the best normative interpretive judgments he or she can make.

Subsequently, as I try to evaluate how well conventionalist and normative accounts apply to particular standards for determining law, I undertake a deeper analysis of distinguishing features of the two sorts of accounts. Here it is useful to make two preliminary points.

First, many of the specific questions that Hart's theory raises about the United States also arise if one tries to construct the most convincing normative account of what law is in this country. In a reconstruction of the basic structure of American law, the problems I raise largely transcend the debate over the nature of law's foundations, though how one tries to resolve the problems will depend partly on one's perspective about those foundations.

The second, more complicated point, is that a good many of Hart's crucial premises are left intact even if the normative challenge is fundamentally accurate. No one denies that certain kinds of legal norms require creation by nonjudicial bodies whose competence to legislate depends on conferral by authoritative legal norms. In most of the United States, for example, judges have no common-law power to create new crimes.¹⁹ Though they may rely on principles to interpret legislative mandates, judges cannot declare behavior to be criminal just because it offends principles that the legal system embraces in some general way. Nor can courts create new taxes or authorize military conscription. These matters are left to legislatures, whose authority is conferred by federal and state constitutions. The validity of a great many legal norms can undoubtedly be traced in much the manner Hart envisions. Also, the legal order undeniably contains important principles of hierarchy: that federal law is superior to state law; that statutory law is superior to judicially created common law; and that constitutional law is superior to both statutory and common law. One aspect of this hierarchy is that rules of common law or interpretations of statutes that are based on principles can be overridden by subsequent legislative choice. In *Riggs v. Palmer*,²⁰ discussed by

18. See especially *LAW'S EMPIRE*, *supra* note 4, at 248, 255-63.

19. See generally MODEL PENAL CODE § 1.5 comment (1985).

20. 115 N.Y. 506, 22 N.E. 188 (1889).

Dworkin,²¹ the court held that a murderer cannot recover under the will of the person he murdered; but if the state legislature explicitly chose to allow such recovery, it could do so.

Even if it is true that in deciding what the law is judges look for the best interpretive theory rather than a socially accepted rule, it is also true that in any stable legal order there is bound to be a very great overlap in the content of what judges see as the best interpretive theories.²² A convergence on many points will amount to a rule, or rules, for determining law that a sociologist could describe. Such is the situation in the United States, for example, in regard to the authority of the Constitution and the supremacy of legislation over the common law. Important theoretical questions about a legal order concern the nature and extent of these basic and agreed-upon standards.

At a deeper level, a normative account of how law is determined does not entirely escape dependence on convention. After all, every judge within a system takes as given certain basic materials that count as law; the judge who refers directly to the Articles of Confederation rather than the Constitution as a source of modern law is crazy. And Dworkin himself has argued that institutional support is critical to the status of principles. A plausible rendering of this understanding would be to say that even a normative account builds on many conventionally accepted sources of law,²³ that the critical respect in which it differs from the conventionalist approach is in claiming that the binding standards for what counts as law extend well beyond what is conventionally accepted.

A normative theorist might resist this ingestion of conventionalism by asserting that nothing is law simply because it is conventionally accepted, that *any* accepted practice regarding the identification of law is in theory open to rejection or revision if it does not fit well with other standards for identifying law.²⁴ Nonetheless, any normative theorist would have to concede that some premises are so fundamental to our legal system, such as the primacy of the federal Constitution over conflicting state law, that a reasonable judge could not reject them. He would also have to concede that even were *every* particular standard for determining law theoretically subject to rejection, the bases

21. See *TAKING RIGHTS SERIOUSLY*, *supra* note 4, at 23-45; *LAW'S EMPIRE*, *supra* note 4, at 15-20.

22. See *LAW'S EMPIRE*, *supra* note 4, at 136-39.

23. See, e.g., Coleman, *supra* note 5; Postema, *supra* note 5.

24. In *LAW'S EMPIRE*, *supra* note 4, at 138, Dworkin suggests that some things in British and American legal systems may be settled as a matter of genuine convention, but he says "nothing *need* be settled as a matter of convention in order for a legal system not only to exist but flourish."

for judging the overall coherence of a challenged practice with the entire law would be largely drawn from a wide collection of socially accepted practices. In sum, one cannot imagine any normative theory of law in which the law of a particular society could be identified wholly independently of socially accepted practices. Further, it would be highly surprising if these practices reflected *just* regularities of behavior and convergences of perspectives among officials and citizens. People and officials rely upon the expectations created by concordant practice. Thus, a plausible normative, or interpretive, alternative to the conventionalist approach to determining law must involve a claim more subtle than the view that convention plays no role at all.

Having endeavored to place Hart's account of the rule of recognition in its broader jurisprudential setting, I undertake to apply that account to the United States, using his views about Britain as a guide.

III. HART'S RULE OF RECOGNITION FOR BRITAIN: A STARTING POINT FOR INVESTIGATION OF THE UNITED STATES

When Hart focuses on the supreme criterion and the ultimate rule of recognition, he addresses himself to the relatively simple situation of Britain — at a time preceding its adherence to the Common Market and to other European agreements which permit multinational bodies to disallow some of their national legal norms.²⁵ From his discussion of Britain we learn more precisely what Hart means by an ultimate rule of recognition and a supreme criterion, and we prepare ourselves to tackle the more complicated legal terrain of the United States.

The supreme criterion, on Hart's account, is that what the Queen in Parliament enacts is law.²⁶ Any norm that emanates from other lawmaking authority and is in conflict with parliamentary legislation must give way to the legislation. Perhaps a more exacting statement of the supreme criterion would include a temporal dimension, indicating that earlier legislation yields to subsequent legislation, but the basic standard of parliamentary supremacy is straightforward.

When we inquire what Hart conceives of as the ultimate rule of recognition in Britain, we must parse passages that lean in different directions. The problem arises over the legal status of custom and precedent. In one discussion, talking about the authority of parlia-

25. See *Macarthys Ltd. v. Smith*, [1979] 3 All E.R. 325, 328-29 (C.A.) (Denning, M.R., dissenting); *Esso Petroleum Co. v. Kingswood Motors (Addlestone) Ltd.*, [1974] 1 Q.B. 142, 151; Chloros, *English Law and European Law: The Problem of Harmonization*, 36 *RABELS ZEITSCHRIFT* 601 (1972).

26. THE CONCEPT OF LAW, *supra* note 1, at 103-04.

mentary legislation "as the ultimate rule of recognition,"²⁷ Hart intimates that in Britain the supreme criterion and the ultimate rule of recognition converge. Yet a few pages earlier, he denies that custom and precedent "owe their status of law . . . to a 'tacit' exercise of legislative power . . ."²⁸ Rather, their status comes from "a rule of recognition which accords them this independent though subordinate place."²⁹

One conceivable way to interpret these passages in conjunction is to suggest that although particular pieces of customary law and precedent do not derive their status from parliamentary action or inaction, the criteria that give these norms authority have issued from Parliament in some way. Given Hart's analytical distinction between the ultimate rule and the supreme criterion, Parliament's power to alter or eliminate the legal status of custom or precedent is plainly not enough by itself to establish that the authority of these kinds of law emanates from Parliament; but perhaps when Parliament established courts, or circumscribed the jurisdiction of existing courts, it positively endorsed these forms of law. Hart, however, gives no hint that this is what he has in mind. More important, this version casts an unacceptable strain on his comment that custom and precedent have an independent place under the rule of recognition, which means that they do not depend on some exercise of power by a legislative body. Particularly since the passages that suggest otherwise are addressed to different issues, by far the most plausible rendering is that the ultimate rule does reach precedent and custom, that these are law in the United Kingdom because they are accepted as law by officials.³⁰ I shall take that as Hart's view when we address the more troublesome analogous questions about the United States.

IV. THE FEDERAL CONSTITUTION AND THE ULTIMATE RULE OF RECOGNITION AND SUPREME CRITERION

We are now ready to address the main subject of the article: What are the ultimate rule of recognition and supreme criterion for the United States? Many of the complicated questions center on the federal Constitution and its relationships to its own component parts and

27. *Id.* at 104.

28. *Id.* at 98.

29. *Id.*

30. This interpretation has been confirmed by a February 7, 1986, letter from Professor Hart, which characterizes as a "slip" the reference to "what the Queen in Parliament enacts is law" as the rule of recognition.

to state law. I deal with these questions first and then consider judge-made law and what I call interpretive techniques.

When first asked, many students suppose that the federal Constitution is the ultimate rule of recognition for the United States, or that the rule of recognition is that "whatever is in the Constitution is law." Before suggesting why either of these notions, unvarnished, is inadequate, I consider the supreme criterion of law for the United States.

A. *A First Approximation: The Amending Clause as the Supreme Criterion*

With one obvious minor qualification, some important edges of uncertainty, and a subtle point about institutional authority, the supreme criterion of law is rather easy to identify, given prevailing assumptions about the American Constitution. A criterion of law is supreme, it will be recalled, if norms adopted according to it take precedence over norms adopted by any other procedure. The criterion about which that is true in the United States is the amending clause, article V, of the Constitution. A provision adopted according to its procedures for amendment has priority not only over state law, federal statutes, and federal judicial decisions, but also over what is in the original Constitution or in earlier amendments.

The obvious minor qualification to this conclusion concerns the constitutional rule, found in the amending clause itself, that no state may lose its equal vote in the Senate without its consent. That rule is not amendable by the ordinary amending process. An exact statement of the supreme criterion would have to cover this specially entrenched practice,³¹ but I shall disregard this slight complication.

1. *Edges of Uncertainty*

The edges of uncertainty concern conceivable restrictions on permissible amendments, appropriate procedures, the status of norms not adopted according to ordinary procedures, and the passage of time. In contrast with India, where the supreme court has interpreted the constitution as barring amendments that are incompatible with the basic structure of the constitution or that infringe certain fundamental rights,³² the dominant assumption in the United States is that amendments adopted in a procedurally proper manner are valid regardless of

31. Hart discusses unamendability briefly in *THE CONCEPT OF LAW*, *supra* note 1, at 71; see also *id.* at 242.

32. See, e.g., *Golak Nath v. State of Punjab*, 54 A.I.R. (S.C.) 1643 (1967); D.D. BASU, *CONSTITUTIONAL LAW OF INDIA* 371-77 (3d ed. 1983).

their substantive content.³³ Still, there may be limits. Perhaps an amendment cannot establish its own unamendability,³⁴ or change the amending clause, or repeal all or most of the Constitution at one fell swoop. In Hart's terminology, there is a limited "open texture" in the supreme criterion; neither the language of the amending clause nor shared understandings of officials resolve the validity of every conceivable provision adopted according to the procedures of the amending clause.

Considerable doubts exist about what appropriate procedures are under article V. May states rescind ratifications?³⁵ Can Congress set a time limit on ratification, and, if so, must it do so in an amendment itself?³⁶ Does the time for ratification lapse if no limit has been set?³⁷ Under the yet-unused procedure by which a convention rather than Congress would propose amendments, can the convention's authority be limited to specific subjects if state legislative applications to Congress to call a convention are so limited?³⁸ Are all these matters genuine legal questions or are they left to be decided by Congress on political grounds?³⁹

Finally, there may be uncertainties as to whether provisions may become valid law though understood not to be adopted by prescribed procedures. Bruce Ackerman has suggested that the reference in the preamble of the Constitution to "We the People" and the specification of a convention alternative for proposing amendments evidence a kind of approval for constitutional reforms that, like the original Constitu-

33. See, e.g., Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446, 448 (1983); cf. L. TRIBE, *CONSTITUTIONAL CHOICES* 13 (1985); Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 438-43 (1983) [hereinafter Tribe, *A Constitution We Are Amending*].

34. This question lies close to one discussed by Hart about Britain — whether a present Parliament could adopt legislation and preclude repeal. In *THE CONCEPT OF LAW*, *supra* note 1, at 145-47, Hart says that it is now clear that Parliament lacks this power, but that the related question whether it can entrench legislation against repeal by an ordinary legislative process remains open.

35. See Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 421-27 (1983).

36. *Id.* at 406-11.

37. *Id.* at 424-27.

38. See Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979). Article V also provides that Congress can provide for ratification by state conventions rather than state legislatures. I here disregard that alternative, used only in connection with the twenty-first amendment.

39. On Congress' role, compare Dellinger, *supra* note 35, with Tribe, *A Constitution We Are Amending*, *supra* note 33. The view that final determination is committed exclusively to Congress need not entail the view that the questions are not legal. One might think these are legal questions as to which the Court has no responsibility, that they are "political questions" only in the sense that judicial disposition is precluded.

tional Convention, leap the bounds of prescribed procedures.⁴⁰ In this event, the Constitution itself might be viewed as conferring at least a quasi-legal status on some measures that would plainly be invalid if one asked only whether they were adopted according to set procedures. Whatever their status prior to endorsement, "new amendments" made by unprescribed means might become authoritative law if "promulgated" by Congress, published by the executive, or accepted over a period of time. If the Constitution can be validly amended by procedures that do not conform strictly with article V, but meet some standard of endorsement or of institutional support and public approval, the range of uncertainty about the supreme criterion is drastically increased.

The possible import of acceptance over time for "amendments" not properly adopted relates to the *continuing force* of amendments that were properly adopted. For these, the passage of time may diminish the legal significance of their having been adopted in accord with the amending clause. I return to this problem after I discuss the ratification clause.

2. Institutional Authority

The subtle point about institutional authority with respect to the supreme criterion concerns the role of Congress and the executive in approval of amendments, and the relationship between various standards different officials might use to determine what counts as law. Exactly what authority the political branches have in settling the validity of amendments is now far from clear, but the leading case on the amendment process indicates that, at least in respect to many issues, Congress makes the final decision whether an amendment has been properly adopted.⁴¹

Before considering the jurisprudential implications of such a principle, I need to narrow a bit the assumption that I am making about the range and nature of authority that may be assigned to Congress. Perhaps courts would balk at acquiescing in a blatant usurpation by Congress accomplished through a purported promulgation of a consti-

40. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) [hereinafter Ackerman, *Storrs Lectures*]. He develops these themes at much greater length in B. ACKERMAN, *DISCOVERING THE CONSTITUTION* (forthcoming).

41. *Coleman v. Miller*, 307 U.S. 433 (1939). Four members of the Court indicated that Congress has undivided and exclusive control of the amendment process. 307 U.S. at 457 (Black, J., concurring). Three Justices in an opinion for "the Court" indicated that courts could not review congressional determinations about timeliness and the significance of prior rejection; that opinion has fairly broad implications for what is committed to Congress. 307 U.S. at 447-56.

tutional amendment.⁴² I am supposing only that within *some range* courts will take what Congress says as final. It is important that the position of the courts within this range is actually to assign final decision to Congress, not merely to give some *deference* to the judgment of Congress in the course of reaching an independent determination of whether an amendment has been properly adopted. Finally, the sort of judgment Congress is to make is important. I am assuming that, at least sometimes, Congress should make an essentially legal determination, one that will be followed by courts even if it is mistaken. I suppose therefore that the authority assigned to Congress is something more than the right to make some nonlegal political judgment about whether acceptance of proposed amendments would be desirable, and something more than the right to fill in the open texture of the process outlined by the amending clause.⁴³ The possibility I mean to examine is that within a certain spectrum Congress' determination whether an amendment has been properly adopted will be a determination controlled by legal standards and will also be a determination accepted as final by the courts. I want to inquire how we would state the supreme criterion for such cases.

From the point of view of Members of Congress viewing a proposed amendment that has something approximating the requisite number of ratifications but is not published by the executive or yet promulgated by Congress,⁴⁴ the supreme criterion is adoption according to the amending clause. Whether that process has been followed will determine a conscientious Member's decision whether to promulgate, or let executive publication stand. The criterion for an amendment that the courts *actually use* will be different: whether a provision has been published or promulgated as having been adopted in accord

42. See Tribe, *A Constitution We Are Amending*, *supra* note 33, at 433.

43. The "political judgment" view supposes that legal standards require acceptance of ratification in some situations and preclude acceptance in others, but that in certain borderline instances Congress may make a determination based on the overall political wisdom of accepting ratification. In that event, the supreme criterion, properly understood, would indicate that in certain circumstances a proposed amendment may, but need not, be taken as having been ratified.

The "discretion to fill open texture" view is subtly different. It supposes that in certain situations the prescriptions of the amending clause, plus perhaps other relevant legal standards, are indeterminate in their coverage. In that event, someone must amplify the details of what counts as a proper ratification, and Congress is left this essentially legislative decision on how to fill in the gaps of existing legal standards (a type of "legislative" decision that is left to courts in most other areas of law).

44. Although *Coleman v. Miller* indicates that Congress is to decide matters of ratification, in actuality virtually all amendments have been published by the executive branch, since 1818 according to statutory authorization. See Dellinger, *supra* note 35, at 400-02. A view that assigns primary responsibility to Congress and purports to be in accord with historical practice must assume that Congress has implicitly accepted amendments that have been published by the executive without congressional involvement.

with the amending process.⁴⁵ How to characterize such a principle of judicial acceptance of congressional determination is troublesome. We might say either that the supreme criterion for Congress really is different from the supreme criterion for courts, or that the courts do not *apply* a supreme criterion that, in some sense, they recognize.

If Hart's notions of the ultimate rule and supreme criterion require that all, or virtually all, officials in their practical judgments really *use* the same standards for what counts as law, the theory indisputably requires emendation. For, once one thinks about this problem, one recognizes that many officials — most obviously lower-court judges and subordinate executive officials — are on many occasions expected to take as authoritative the judgments of other, often higher, officials as part of their final standards for what is law.⁴⁶ Hart, in fact, recognizes the possibility that legal systems may place some subjects outside of judicial competence.⁴⁷ Although he does not explore the general significance for his theory of subordination and deference among officials, we must suppose that when Hart talks about official acceptance of an ultimate rule and a supreme criterion he does not mean that all officials use these directly in their decisions.

The important practical point is fairly straightforward. So long as the principles of authoritative determination are reasonably clear and settled, a legal order can operate quite smoothly even though many officials often do not themselves apply the ultimate rule and supreme criterion used by the highest relevant officials. We might conceptualize this conclusion by saying, with Joseph Raz, that within a legal order there may be "various rules of recognition, each addressed to a different kind of officials";⁴⁸ or we might understand the rule of recognition as the ultimate standards of law used by officials who are not simply accepting the judgments of other officials. With sufficient effort, either sort of conceptualization could fit reality. Given the pervasiveness of acceptance of judgments of higher officials, the latter course seems preferable; certainly it is more faithful to the overall spirit of Hart's treatment.

45. This standard might also be used by subsequent Congresses, who would take initial promulgation or publication as determinative of validity. In that event, the *present validity* of an amendment may be determined for *all* official bodies by acceptance by Congress at a specific point in time.

46. I use the phrase "on many occasions" because in the typical situation it matters whether the higher authority has reached a judgment. If it has not, the subordinate authority may apply the same standards to a problem as the higher authority would. If the higher authority has spoken, the lower authority takes its judgment as conclusive.

47. THE CONCEPT OF LAW, *supra* note 1, at 71, 242.

48. J. RAZ, *supra* note 10, at 200.

In any complete account, we should need to explicate situations that are intermediate between wholly independent judgment and complete acceptance of the judgment of another, situations in which one official body both gives considerable deference to another official body and regards itself as authorized to reject that judgment if the judgment is clearly enough mistaken. I address that problem when I discuss precedents and techniques of interpretation.

As far as the supreme criterion is concerned, I shall assume for the time being that the supreme criterion, with appropriate qualifications, is the amending clause. In the ensuing discussion, I do not usually complicate matters by referring to whatever special authority Congress may have with respect to the amending process.

B. *The Original Constitution and the Ratification Clause*

The tentative conclusion, qualified as it is, that the amending clause is the supreme criterion helps us to understand why the ultimate rule of recognition does not include⁴⁹ either the entire Constitution itself or the norm that whatever is in the Constitution is law. The amendments generally become valid law because they are adopted in accordance with the amending clause. The relationship between amendments and the amending clause is basically the same as that between particular laws and the authority of Parliament to enact laws. When one asks why a particular new amendment is valid law, one can take a step higher within the Constitution, to conformity with the amending process, to explain the amendment's validity. One need not simply refer to official acceptance of that amendment or of amendments in general. The new amendment itself does not need to be justified by an ultimate rule of recognition that rests on acceptance, because it emanates from a process that is prescribed in an authoritative legal document, the original Constitution.

These observations about the amendments and the amending clause leave us with three initial candidates for formulations that indicate how the Constitution relates to the ultimate rule of recognition:

- (1) All or part of the ultimate rule is the Constitution itself, including the amending clause but excluding the amendments.
- (2) All or part of the ultimate rule is: Whatever the Constitution contains that is not itself enacted according to another part of the Constitution is law.

49. My reason for using the phrase "does not include" is that some elements outside the federal Constitution turn out to be part of the ultimate rule of recognition.

(3) All or part of the ultimate rule is: Whatever has been adopted in accord with the ratification clause is law.

Before turning to these three possibilities, I briefly address the language of the Constitution's preamble. It says: "We the people . . . do ordain and establish this Constitution" Reference to the people is not evidently presented as a legal standard ordinary officials can use to determine what is valid.⁵⁰ Even if it is said that our country possesses a revolutionary heritage, and that we recognize the right of the people to overthrow an unjust government, the revolutionary principle is not a straightforward test of legality. Hart is always clear that the rule of recognition is a legal standard that judges and other officials can apply. Whatever "the people's" status as a matter of deep political philosophy, "the people" or "the people's will" is not part of the ultimate rule of recognition for the legal order in the United States.⁵¹

In considering the three possible formulations, I shall begin with the one involving the ratification clause of article VI, which states that upon ratification by nine states the Constitution becomes effective between those states. Since in proposing a new Constitution the members of the Constitutional Convention exceeded the authority conferred on them to propose amendments to the Articles of Confederation,⁵² the chain of legal authority does not reach back prior to the Convention. In at least some sense, the main body of the Constitution owes its status as valid law to its ratification by the procedure the Constitution contains. It would not have become law for this country if the proposed Constitution had remained unratified. Does the main body of the Constitution, therefore, stand in the same relation to the ratification clause as the amendments stand in relation to the amending clause?

We need to consider three salient and related differences between the amending clause and the ratification clause. Unlike the amending clause, the ratification clause is a one-time-only matter. Were this not clear before the Civil War, it is now settled that a state that ratified the

50. I do not claim that a reference to "the people" could never be such a standard. We could imagine a society in which judges could treat as invalid norms that did not accord with the views of the people, or one in which judges could even use determinations of the views of the people as a basis for establishing new norms.

51. If Bruce Ackerman is right that the Constitution contains a kind of implicit approval of change in nonauthorized ways, see Ackerman, *Storrs Lectures*, *supra* note 40, then "We the People" could play some role in determining the legal status of such changes. Suitably interpreted, it might be used by officials to determine whether or not changes brought about in procedurally imperfect ways should be taken as authoritative nonetheless. Were this so, the statement in the text would need to be qualified.

52. As Ackerman notes, *id.* at 1017 n.6, an argument can be made that substantive changes as sweeping as those in the proposed Constitution were within the bounds of the Convention's authority; but the possibility of ratification by nine states clearly was not.

Constitution is not free later to withdraw. The second, more crucial, difference concerns the stage at which authoritativeness of the two clauses was established. The legal status of the amending clause preceded any amendments adopted pursuant to it. But the ratification clause had no status prior to the substance of what was to be ratified by it. And we cannot even be sure it was fully accepted as authoritative until officials accepted the Constitution as effective law. Conceivably small states might have been favorably enough disposed to the Constitution to undertake the ratification process, but their officials might have hesitated to take the Constitution as governing law if major states like Virginia, Massachusetts, New York, and Pennsylvania had failed to ratify. It is at least possible that the ratification clause was not fully accepted as authoritative until after the Constitution was ratified by nine states.⁵³

The third important difference between the ratification clause and the amending clause is closely tied to the second. The ratification clause cannot be viewed apart from the substance of the Constitution. The clause does not prescribe a general procedure for lawmaking; rather it indicates that a particular group of potential legal norms will become law when nine states ratify. Let us assume that prior to actual ratification officials in the states did accept that, if the Constitution was ratified in their state and eight others, it would become authoritative for their state. Following Hart's hierarchical chain, we might be tempted to say that the ratification process was accepted as one by which authoritative law could be made, and that the substantive provisions of the Constitution were valid because ratified by that process. But such a statement might be misleading in a way that a statement about acceptance of the authority of Parliament would not be. It would be misleading because we do not know whether the ratification clause would have been accepted if the Constitution had had a very different substance. Since no state was bound to participate in the constitutional union without its consent, the same principle of ratification by nine state conventions *might* have been widely accepted given very different substantive provisions, but we cannot be certain. All we can confidently say is that in the context of this Constitution the ratification procedure was accepted. Here the procedure for making law and the law to be made are intertwined in a way not contemplated by the usual model of a rule of recognition. This analysis suggests that the

53. See J. RAZ, *supra* note 10, at 138, criticizing Kelsen's concept of a basic norm that the makers of the original Constitution should be obeyed. Raz says a first Constitution can become law because it is part of an efficacious legal system, a fact that may not be determinable until after the Constitution is first issued.

acceptance of the ratification clause cannot be regarded independently of the body of the Constitution; and that the legal authority of the original Constitution derives from a procedure whose significance is best understood in conjunction with the rest of the Constitution.

Whatever one concludes about the status of the ratification clause at the time of the Constitution's adoption, it almost certainly is not *now* any part of the ultimate rule of recognition. A judge might, to be sure, say that the Constitution is law because it was ratified — meaning that from the historical point of view we would not have the Constitution we do if the document had remained unratified. But no judge or other official would presently be likely to countenance a legal argument that an original state purportedly bound to comply with the Constitution had not ratified it properly. We may be hard put even to think of the kind of factual evidence that could cast an apparent ratification into question. Are we to say that ratification is now not mentioned as of *present legal significance* because everyone assumes that the ratification procedure was followed, but that ratification still lies in the background as part of the ultimate rule of recognition? Or are we to say that now the legal authority of the rest of the original Constitution is established by its continued acceptance and that the original ratification procedure is no longer directly relevant to tracing what counts as law?⁵⁴ The latter is almost certainly the more accurate modern characterization.

C. *A Reprise — The Supreme Criterion and the Amending Clause*

This conclusion about the ratification clause requires some reassessment of the relation of amendments to the amending clause. Whether any officials would look behind amendments of long standing to judge the validity of their ratification, or even the *genuineness* of executive publication, is highly doubtful. In contrast to the present role of the ratification clause, this point has practical significance. The reason is that serious questions can be raised about the original validity of the thirteenth and fourteenth amendments.⁵⁵ Both were proposed by Congresses devoid of representatives from seceding states. Ratification of the thirteenth amendment depended on the approval of southern states whose representatives were excluded from the Thirty-

54. I put aside here the possibility that the manner in which the Constitution was ratified bears on how its provisions should be interpreted.

55. The problems are discussed in great depth in B. ACKERMAN, *DISCOVERING THE CONSTITUTION*, *supra* note 40; the fourteenth amendment issue is summarized in Ackerman, *Storrs Lectures*, *supra* note 40, at 1065-70; see also A. KELLEY, W. HARBISON & H. BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 334-35 (1983).

Ninth Congress, a combination of events that powerfully casts into question whether the southern governments could be legitimate enough to ratify the thirteenth amendment and illegitimate enough to have representatives properly excluded from the Congress that proposed the fourteenth amendment. The approval by southern states of the thirteenth amendment was achieved by strong presidential pressure, and approval of the fourteenth amendment was a requisite to being represented again in the Congress. Arguments about the invalidity of the amendments have failed in the courts⁵⁶ but the Supreme Court generally is open to reexamining constitutional questions. Given earlier cases in which the Supreme Court has passed on the amendment process,⁵⁷ the diminished scope of the political question doctrine in recent decades,⁵⁸ and the especially troublesome aspect of federal coercion of state approval, it is possible that the Supreme Court would review the validity of a modern amendment ratified in circumstances similar to those surrounding the two amendments.⁵⁹ Still, given the extent to which the Civil War amendments have become part of the fabric of our constitutional order, it is unthinkable that the Court would *now* consider an argument that they were not properly ratified. The *present* authority of these amendments may depend more on their acceptance for over a century than on their actual adoption by a process that may or may not now be thought to conform to what article V prescribes. Whatever the original source of authority of these constitutional standards may be, their present legal status, like that of provisions adopted under the original ratification clause, depends more directly on acceptance than on how they were adopted; and the same may be true of old amendments originally adopted in an uncontroversial manner.

Does this conclusion require a reformulation of the supreme criterion? That depends on exactly what question is asked. If the question is what present method of lawmaking, if any, is superior to all other sources of law in the society, the answer is law made according to the amending clause (and perhaps law made by procedures that are close enough to those prescribed in the amending clause). Putting aside the constitutional rule of equal state votes in the Senate, a modern amend-

56. See, e.g., *Maryland Petition Comm. v. Johnson*, 265 F. Supp. 823 (D. Md. 1967), *aff'd*, 391 F.2d 933 (4th Cir. 1968); *United States v. Association of Citizens Councils*, 187 F. Supp. 846 (W.D. La. 1960); *United States v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954).

57. These are summarized in Dellinger, *supra* note 35, at 403-05.

58. See, e.g., *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962).

59. It is probably unrealistic to imagine "similar circumstances" without supposing similar cataclysmic political events, in which case ordinary judicial doctrines might have little relevance; but what the Court might actually do in a similar setting is not critical to my main point here.

ment would take priority over all conflicting legal rules. For *this question*, no reformulation of the supreme criterion is needed. But if the question is what the source of authority is of that *body of law* that takes precedence over all others, then the answer needs to validate all unrepealed amendments. The present source of authority of that entire body of law may not be limited to actual adoption according to the amending clause and promulgation by the political branches, but may include continued acceptance of provisions as valid amendments. A criterion of law designed to account for the present legal status of the body of amendments may need to be expanded to include the way in which continued acceptance can supplant adoption by a specific procedure as the source of authority.

D. *How the Rule of Recognition Reaches the Constitution*

With these observations about the ratification and amending clauses, we can see that the status of old amendments in respect to the ultimate rule of recognition is less clear than I initially indicated. An amendment whose *present validity* derives from adoption by a prescribed procedure does not depend directly on the ultimate rule of recognition. An "amendment" whose present authority rests on acceptance as an amendment may be part of the body of law that depends more directly on the ultimate rule.

We are now ready to reformulate and consider the remaining two candidates for how the Constitution relates to the ultimate rule of recognition:

(1) All or part of the ultimate rule is the Constitution itself, including the amending clause and any amendments whose present legal authority rests on acceptance, but excluding amendments whose present legal authority rests on their adoption according to the amending clause;

(2) All or part of the ultimate rule is: Whatever the Constitution contains, the present legal authority of which does not depend on enactment by a procedure prescribed in the Constitution, is law.

Which of these formulations is to be preferred? There seems no practical difference between saying that much of the Constitution is at least part of the ultimate rule of recognition and saying that at least part of the rule is that what the Constitution contains, with some qualifications, counts as law. Under either formulation, what is in the Constitution is authoritative law, and no reference to some definitive legal source higher than the Constitution establishes that.

From a conceptual perspective, the second formulation appears better, for two related reasons. First, saying that much of the Consti-

tution is part or all of the ultimate rule is inelegant. It is difficult, though perhaps not impossible, to think of all the various parts of the original Constitution as a single complex rule for identifying what counts as law. We are more comfortable thinking of the Constitution as containing a substantial number of discrete rules. Moreover, while a sociologist might say that an ultimate source of legal authority is most of the provisions of the Constitution, it is awkward to think of officials as somehow accepting that set of provisions, when most officials, even judges, are not even aware of all the relevant provisions. Second, it is not mere coincidence that the standards of the Constitution are accepted as law; they are accepted because they are part of the Constitution. A formulation for all or part of the rule of recognition that focuses on what the Constitution contains better expresses this reality than simply saying that the provisions of the Constitution are accepted as law. Such a formulation states a rule that judges or other officials may reasonably employ to decide if a standard counts as law.

There is one substantial worry about casting the ultimate rule in terms of what the Constitution contains counting as law. Recall that in connection with the ratification clause I urged that acceptance of provisions adopted according to that procedure could not be divorced from the substance of the provisions proposed. One might say the same thing about an ultimate rule that what the Constitution contains is law. *That rule* may be accepted only because much of what the Constitution contains is, and has been, regarded as substantively sound or desirable. But the worry here about a misleading separation of form from substance is much less telling than the same worry about the ratification clause, because a rule cast in terms of what the Constitution contains does not really suggest that very different provisions in the Constitution would also be accepted. So long as we understand that acceptance of a rule that what the Constitution contains is law cannot be detached from the substance of the constitutional provisions, a formulation in terms of what the Constitution contains seems most appropriate.

The discussion in this section permits us to draw some significant general conclusions. One concerns the relationship between the ultimate rule of recognition and the supreme criterion. In *The Concept of Law*, Hart assumes that the supreme criterion will be either part or all of the ultimate rule of recognition. The preceding analysis has demonstrated another possibility. That possibility would be most clearly realized if the ratification clause were now considered a critical part of the rule of recognition. The amending clause would be valid law because adopted according to the ratification clause; it, therefore, would

not be part of the ultimate rule of recognition. The amending clause would remain the supreme criterion because norms adopted according to it would override other norms. Put more abstractly, the supreme criterion could derive its own authority from enactment in accord with the ultimate rule of recognition rather than constituting a part of that rule. Of course, if the ratification clause no longer has legal significance, the present legal status of the amending clause does not depend on it. However, the derivative character of the supreme criterion remains to a degree, if the correct present formulation of the ultimate rule of recognition is in terms of most of what the Constitution contains, since the amending clause then owes its authority to being among the materials this ultimate rule treats as legal.⁶⁰

Three other significant conclusions are closely related to each other. First, what was once all or part of an ultimate rule of recognition could lose its significance over time in a stable legal order. That may well have happened in respect to the ratification clause. Second, at many points in time in stable legal orders it may be hard to say how ultimate a criterion for identifying law is, because no one really knows if a norm may be challenged as invalid under a procedure everyone has been pretty sure was followed. Hart, himself, clearly recognizes that the ultimate rule of recognition in a stable legal order can have gaps.⁶¹ Also, in a discussion of England's relation to former colonies, he indicates how the ultimate rule can change in a stable system as a break is made with the past.⁶² But he does not draw attention to the possibility that subtle shifts over time concerning how high one can go in the hierarchy of legal authorization can lead to deep uncertainties about where derivation stops and acceptance begins within well-operating legal orders. The third conclusion follows from the second. A stable legal order can operate quite well even if relevant officials have drastically different opinions about where derivation from higher norms stops and acceptance begins.⁶³ To give a specific illustration, if three Justices believe that the fourteenth amendment is valid because properly adopted, three believe it counts as valid for the Supreme Court because promulgated by Congress, and three believe it is authoritative

60. H.L.A. Hart drew my attention to this point in correspondence. The "derivation" is a little less sharp than if the ratification clause was critical under the ultimate rule, because, as indicated in the text, the substance of the Constitution is more closely intertwined with the idea that what the Constitution contains is law than with the idea that what is adopted in accordance with the ratification clause is law.

61. THE CONCEPT OF LAW, *supra* note 1, at 120.

62. *Id.* at 117-18.

63. See Golding, *Kelsen and the Concept of 'Legal System,'* in MORE ESSAYS IN LEGAL PHILOSOPHY 69, 98-99 (R. Summers ed. 1971).

because so long accepted, they agree on its legal status, the point of practical legal significance which is now so obvious it is not litigated.

I have explored the status of the federal Constitution in connection with original states. I assume that similar conclusions hold for the application of the Constitution in states admitted to the union, but I have not worked out that variation.

V. STATE LAW AND THE RULE OF RECOGNITION

Some reference to what is contained in the federal Constitution constitutes at least a crucial part of the ultimate rule of recognition. I now consider what, if any, standards outside such a reference are contained in the ultimate rule. Since a standard for determining law is part of the ultimate rule only if it is not derivable from a higher legal standard, any standard for law that is derivable from the federal Constitution is not part of the ultimate rule.

One fundamental question concerns the authority of state law. I shall begin to address that question by imagining that the status of some state statute is in question months after the original Constitution has been ratified. The statute has been passed in proper form but a question has been raised whether the statute is within the authority of the state legislature to enact. We would initially look to the state constitution to see if it authorizes that kind of legislation explicitly or implicitly. Can we look yet higher to ascertain the source of the state constitution's legal authority? Certainly the federal Constitution sets limits on what state governments can do, so we need to examine whether the state constitutional authorization is *compatible* with the federal document and with federal legislation adopted under it. But the original federal Constitution does not actually confer power on the states; it only limits some powers they already have. The federal Constitution also does not settle the legal status of the state's constitution; that depends upon the state constitution's having been adopted according to procedures that already had approved legal status within the state, or former colony, or upon the constitution's being accepted by officials as containing the highest law in the state. For any original state, therefore, the ultimate rule of recognition would include either the procedural mechanisms by which the state constitution was adopted or a principle that much of what is contained in the state constitution is law.⁶⁴ Even *as to state law*, a reference to the federal Constitution would be a *part* of the ultimate rule of recognition, since

64. I include the words "much of" to take account of amendments in a manner similar to that applying to the federal Constitution.

federal law contained in or authorized by the federal Constitution sets negative limits on the overall authority of state law. But the positive authority of state law could not itself be *derived* from the federal Constitution.

The conclusion that for original states within the federal union the ultimate rule of recognition would not be limited to the federal Constitution but would include references to state law is not altered by adoption of the tenth amendment. That amendment does say that powers not delegated to the United States "are reserved to the States respectively, or to the people"; but this is an explication of an already implied restriction on federal powers rather than a conferral of powers on the states.⁶⁵ In a sense, the Constitution as a whole does, with the tenth amendment, outline the distribution of powers between state and federal governments, but that does not make the Constitution the legal source of state powers.

An argument might be made that this original conception has shifted over time, that with the increase in federal power officials now conceive of state authority as derived from the federal Constitution. Further, with respect to states joining the union after 1789, their admission might be said to represent federal approval of the exercise of state powers within the union. Nevertheless, the federal Constitution and federal statutes authorized by it remain essentially a negative restraint on state power, barring some subjects from state involvement, precluding many outcomes otherwise within state authority, and demanding a republican form of government.⁶⁶

Even if the authority of the states to act within their domains was actually conferred by the federal Constitution, it would not follow that the ultimate rule of recognition could be limited to federal law. The reason is that a general conferral of power to act need not prescribe the form of government by which action is taken. The federal Constitution does not prescribe that all state authority must henceforth be exercised in accordance with an existing state constitution or *legal* successors to that constitution. We might imagine a state analogue to the national transition from the Articles of Confederation to the Constitution. A state convention is called with authority only to propose amendments to the state constitution. Instead it proposes a wholly new constitution and a method of adoption that differs from the method of amendment of the existing constitution. The proposed new

65. See *United States v. Darby*, 312 U.S. 100, 124 (1941).

66. U.S. CONST. art. IV, § 4. Some states when admitted to the union had special restraints placed on state law as a condition of admission. Certain western states, for instance, were precluded from having any law permitting polygamy.

constitution is "adopted" in the prescribed manner and all officials and citizens accept it as the authoritative state constitution. A sharp break in the chain of legal authority and a drastic shift in the standards for law within the state have occurred. But as long as a republican form of government and the federally vested rights of individuals have not been disturbed,⁶⁷ no violation of the federal Constitution has taken place. The possibility of such change shows that the present authority of particular state constitutions is not derived from the federal Constitution, but from acceptance or from creation by means accepted within the state. The rule of recognition for any location within the fifty states must include state as well as federal law.

VI. JUDGE-CREATED LAW: THE AUTHORITY OF PRECEDENT

I turn now to the more perplexing problem of the authority of courts to make law and the techniques by which they interpret legal materials. For clarity of analysis, I have, somewhat artificially, distinguished the authority of precedent, discussed in this section, from the interpretive standards courts use, discussed in the next section. Since interpretive standards circumscribe the meaning and force of precedents, these subjects are closely related, but it is initially helpful to regard precedents as legal rules created by courts, before attacking the complex questions about interpretive standards.

By talking of precedents as law made by courts, I do not mean here to presuppose any controversial position about judicial power. Hart's view, shared by most American legal philosophers in this century and probably still dominant, is that courts have in some cases a kind of legislative discretion;⁶⁸ as Cardozo put it, they legislate "between gaps."⁶⁹ That view has been challenged by Ronald Dworkin,⁷⁰ among others.⁷¹ But even those who claim that there is a right answer to every legal case do not deny that if a highest court reaches the wrong answer, that answer can change the law. Mistaken precedents, if they are not too mistaken, are to be followed as law in future cases; and a related series of initially mistaken precedents can alter the law more

67. I am assuming that a formal break in the chain of legality would not be enough by itself for a citizen or official to mount a successful challenge under the due process clause of the fourteenth amendment. How one would describe the legal posture if revision did violate some vested rights, and federal courts recognized the legal effectiveness of the revision but required compensation for the violated rights, would be complicated.

68. See THE CONCEPT OF LAW, *supra* note 1, at 121-50.

69. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-14 (1921).

70. See, e.g., TAKING RIGHTS SERIOUSLY, *supra* note 4, at 31-39.

71. See, e.g., R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 181-210 (1975).

generally.⁷² That is enough to support the power of courts to create law in the sense I intend here.

In discussing the significance for a rule of recognition of the force of precedent, I shall begin with common-law precedents, discussed by Hart, and then consider precedent in legislative and constitutional interpretation.

A. *Common Law*

In describing Hart's account for Britain, I considered whether judicial power to generate common law by precedent derives from higher standards within the law, or rests on acceptance and is therefore grounded in the ultimate rule of recognition. I asserted that Hart's view is definitely that the power rests on acceptance and is covered by the rule of recognition. The same issue arises for the United States, but its dimensions here are significantly different, because of our federal system, written constitutions, and "reception" statutes.

If I am right that the authority of state law is not wholly derivative from the federal Constitution, the status of judicial lawmaking power is a question for both the federal and state aspects of a rule of recognition. One possibility is that written constitutions authorizing the creation or continued existence of courts impliedly confer on the courts a traditional power to make law, even though the relevant provisions do not specify how courts are to decide cases or what the significance of their decisions will be. The argument to this effect is essentially the same as the argument that a simple statute creating courts or conferring jurisdiction approves traditional judicial power; but, since a constitution represents a more comprehensive and deliberate view about desired institutions than a limited statute, the argument of implicit endorsement has somewhat more power when it rests on a constitution. The argument is at its strongest when no courts existed in that jurisdiction before the constitution was adopted. That is true in respect to federal courts in the United States, which were authorized by article III and created by Congress in accord with that article.⁷³ Within states, courts are also typically authorized by constitutions and created by statutes, but many state courts predated statehood and some of these may have enjoyed a continuous existence up to the present.

Many states also have in their constitutions or statutes "reception" provisions that receive the pre-Revolutionary common law of Eng-

72. Almost certainly the ways that courts formulate "correct" results also affect the law. That is a point little discussed by "law as discovery" theorists, but Dworkin briefly comments on the subject in *LAW'S EMPIRE*, *supra* note 4, at 248.

73. Judiciary Act of 1789, 1 Stat. 73.

land;⁷⁴ and a federal ordinance of 1787, which applied initially to the Northwest Territory and then to the states created out of that territory, gave judges within the territory "a common law jurisdiction."⁷⁵ The language of these provisions varies, but arguably they represent a more positive endorsement of judicial law-creating power than the mere setting up of courts.

If we follow Hart's approach to the ultimate rule of recognition, the capacity of the legislature or the makers of constitutions to *change* the nature of judicial power does not itself entail that the legal status of judicial decisions derives from implicit authorization. What is critical is whether the authority of precedent derives from some more positive implicit authorization or rather, as Hart assumes about Britain, rests on acceptance by officials. In the latter event, the authority of precedent is part of the ultimate rule of recognition; otherwise it is not. As Hart obviously supposes, claiming that the status of precedent is impliedly conferred simply by the statutory or constitutional creation, or continuation, of courts is somewhat artificial. And even if the practice of giving *some* weight to prior decisions was thought to be inherent in the practice of courts or implicitly approved by legislative action, that would not mean that the full law-creating power that common law courts now have has been authorized legislatively. Whether such authorization has been given by reception statutes, especially those like the Ordinance of 1787 whose reference to a "common law jurisdiction" may include a traditional law-creating power, is more difficult.

Perhaps if one had to choose between authorization and acceptance as the basis for the law-creating power of judges in the United States, one might agree with Hart that acceptance is critical;⁷⁶ but the dichotomy that Hart assumes is itself somewhat artificial. Why cannot we say that precedent has the status it does *both* because that status has been and is presently accepted by concerned officials *and* because higher lawmaking authorities have obliquely indicated their approval? If one were trying to explain to a new judge why common-law precedents count for a good deal, one would certainly say more about these higher lawmaking authorities than that they could have eliminated or altered judicial power and have chosen not to do so. Ordinary legislation dealing with courts does reflect a kind of implicit

74. *E.g.*, MD. CONST. Declaration of Rights art. V; N.C. GEN. STAT. § 4-1 (1986); VA. CODE ANN. §§ 1-18 (1979).

75. Northwest Ordinance of 1787, 1 Stat. 51 n.a.

76. One would have to review all the relevant legal materials in a particular state to make a considered judgment for that state.

approval of present practices that bolsters those practices; and the support of many reception provisions is even stronger. It might be said that these implicit approvals only help explain why acceptance continues, but the point is that they help explain continued acceptance in a special way, indicating that references up in the hierarchy of norms are supportive of a subordinate feature of the ultimate rule of recognition. If so, acceptance by officials and derivation from higher norms may intertwine here in a way that Hart's sharp distinction of derivation and acceptance does not suggest.

This is an insight that warrants generalization beyond the force of precedents. For example, it helps to show why the distinction between acceptance and derivation in respect to constitutional amendments is also misleading. At points in time, the legal status of particular constitutional amendments might rest *both* on continued official acceptance as constitutional standards *and* on adoption by the procedure prescribed under the amending clause.

Once we understand how acceptance and derivation intertwine in respect to the status of precedents, our attention is drawn to the various institutional aspects of a doctrine of precedent. In jurisdictions in which overruling of precedents is permitted, a particular precedent may carry more conclusive authority for a lower court, and perhaps for executive officials, than it carries for the court that has established it. And, since the operation of a legal system would be much more uneven if lower courts and executive officers felt free to disregard judicial decisions they thought unsound than if the courts rendering the decisions felt free to depart from them, the argument that the establishment of a hierarchy of courts and of separate branches of government implicitly points to affording authority to precedents may be strongest when one considers lower courts and executive officials. I shall not repeat these observations in connection with precedent in statutory and constitutional interpretation, to which I now turn, but they apply in those contexts as well.⁷⁷

B. *Statutory Interpretations*

Courts interpret legislation and reach controversial conclusions about the significance of statutory rules. Once a court interprets a statute to have a particular meaning, the court in a subsequent case will be hesitant to depart from that interpretation. That hesitancy rep-

77. There is a problem that deserves mention. When the highest court interprets statutory and constitutional materials, it might be argued that other officials accede to its decisions to avoid conflict, but do not necessarily concede that it has any genuine lawmaking power. See *also* note 80 *infra*.

resents the force of precedent in statutory cases. We might initially be inclined not to think of precedent in these cases as having any separate place in the rule of recognition, viewing the force of precedent here either as an adjunct of legislation itself or as an adjunct of the general common-law power of courts. But the subject cannot be disposed of so easily.

The legislature gets its power from the constitution, and if courts are plainly supposed to apply legislation to concrete cases, it follows that they will have to interpret statutes. That essential responsibility may be conferred implicitly by the constitution. But neither the constitution nor statutes tell courts how to do their job of interpretation, beyond occasional legislative injunctions to construe a statute "liberally" or "according to the fair import of its terms." The status of precedents in statutory cases is not clearly approved in either constitutions or statutes. The argument that the status is implicitly approved by the creation and continuation of courts is less powerful than the similar argument in respect to common-law precedents — because the role of precedents in statutory cases is even now less striking and less well recognized, and would have been a matter of much slighter significance in previous eras.

The role of precedent in statutory cases does not follow ineluctably from the role of precedent in common-law cases, since one can imagine courts adhering to precedents in common-law cases but not doing so in statutory cases. Let us imagine there are settled standards, say the apparent force of the statutory language in context or the intent of the legislature,⁷⁸ for interpreting a statute that has not received a prior relevant interpretation. A system of law could work reasonably well if the same court in a subsequent case applied exactly the same standards, following a precedent only insofar as the intrinsic force of its reasoning was persuasive and insofar as its continued existence could reasonably affect judgment about the legislature's actual aim.⁷⁹ In such a system, precedents in statutory cases would have no inherent authority. Whatever the exact force of precedent in our system, I assume that precedents count for more than the power of their reasoning and what they tell a subsequent court about legislative aims. This *extra* force of precedent may have developed and been accepted easily

78. At a deep conceptual level there is controversy about appropriate standards for statutory interpretation, and each of these two candidates would require extensive explication to be defended; but the oversimplified supposition in the text is sufficient to make the relevant point about precedent.

79. If the legislature does not act contrary to a precedent, that may be some evidence (usually very weak) about what the legislature originally aimed to do, or about what the legislature *now* wants to do, or both.

because of the place of precedent in common-law cases, but it is analytically distinguishable.

Since an argument based on constitutional or legislative authorization is actually weaker in respect to the precedential force of statutory interpretations than in respect to common-law precedents, the law-making power of courts in statutory cases depends more clearly on acceptance than their lawmaking power in common-law cases. The rule of recognition for federal and state law must be formulated in a manner that gives this judicial power in statutory cases explicit recognition or that casts the general power to create law by precedent in terms plainly broad enough to include statutory cases.⁸⁰

C. *Constitutional Decisions*

What needs to be said about precedent in constitutional law resembles closely what I have said about precedent in statutory cases. There are some special wrinkles, however, having to do with the weaker force of prior decisions in constitutional interpretation, the higher status of constitutional law, and the possibly unauthorized status of some constitutional adjudication.

Judicial opinions sometimes downplay the significance of precedent in constitutional adjudication, and it is generally supposed that, because of the difficulties of constitutional amendment, courts do and should feel freer to overrule constitutional decisions than statutory and common-law decisions, whose rules can be corrected by simple legislation. Does precedent have an independent place in constitutional law, or are highest-court judges always seeking to make a "best" interpretation of the Constitution — best not depending at all on what a previous majority happens to have said? Once the issue is put this way, the answer is clear. Most Supreme Court Justices give at least some weight to precedent; if the legal question is a close one and the prior decision has not caused any serious injustice, Justices will not overturn a prior holding even if they might have reached the contrary result in the original case. When a line of decisions becomes an important part of the fabric of the law, Justices will be even more hesitant to overrule prevailing doctrine, though that happens occasionally. Thus

80. One might try to avoid this conclusion by arguing that as far as statutes are concerned, the standard for what counts as law is statable quite independent of precedents, and the force of precedent merely reflects deference to the original deciding court. Since the power of precedent is so similar in common-law and statutory cases, this argument seems an evasion; but the problem does show how subtle the difference is between saying: (1) Official Body *A* has a law-creating power; and (2) Official Body *A* has no law-creating power but its determination about what the law is will be deferred to by other official bodies, including *A* at a later date. See also note 77 *supra*; notes 43-45 *supra* and accompanying text.

precedents do matter in constitutional adjudication, and judges in cases posing new and difficult issues have a kind of lawmaking power.

On what basis does this power rest? Let us first assume that there is no doubt that courts are supposed to engage in substantive constitutional interpretation. As far as the federal courts and federal Constitution are concerned, such authority is fairly inferred from the Constitution in respect to constitutional challenges to state laws.⁸¹ But the authority to interpret does not necessarily establish the status of precedents. A system of constitutional interpretation, like a system of statutory interpretation, could conceivably work if prior decisions had no independent force. Conferral of a power to interpret does not represent a judgment by those who made and approved the Constitution in favor of according force to constitutional precedents. Thus, this force neither rests directly on the Constitution nor follows inexorably from the force of precedents in common-law cases. The ultimate rule of recognition must include the force of precedents in constitutional cases.

Constitutional decisions have a higher status than both legislation and common law. Since officials generally treat a constitution as saying what the highest judges say it says, the power of courts to make constitutional law by decisions might initially be thought to be an aspect not only of the ultimate rule of recognition but also of the supreme criterion, that is, an aspect of the form of law that takes priority over all other forms of law.

That view would be mistaken, however. Since new constitutional amendments can override judicial interpretations of the Constitution, the legal force of constitutional interpretations is not part of the supreme criterion of law.

Any doubts about the courts' original constitutional authority to engage in substantive constitutional interpretation merely strengthen the conclusion that the force of constitutional precedents rests on acceptance. Although *Marbury v. Madison*⁸² solidly established the power of the Supreme Court to pass on the constitutional validity of federal laws, some have argued, contrary to my own view, that the true purport of the federal Constitution was not to authorize such ju-

81. The supremacy clause of article VI requires state courts to treat federal law, including the federal Constitution, as the "supreme law of the land." If a claim is made that a state law violates the federal Constitution, a state court must interpret the federal Constitution to resolve the conflict. Since it would be senseless to have federal courts resolving such cases on a wholly different basis from state courts, federal courts must be supposed to have a similar authority, and duty.

82. 5 U.S. (1 Cranch) 137 (1803).

dicial determinations.⁸³ If the practice of judicial review of federal legislation lacked authority in the original Constitution, the development of the authority to interpret rested only on acceptance of officials. Even in this case, it might be argued that more recent constitutional amendments presuppose such authority and therefore confer on it a kind of constitutional support. Here again, we would face a difficult problem about when derivation ends and acceptance begins; and a realistic resolution might claim that the present power to interpret the Constitution in challenges to federal laws rests *both* on acceptance and implied approval by higher lawmaking powers, the amenders of the Constitution. To summarize, so far as the authority to interpret rests on acceptance, the force of precedent also rests on acceptance; but even if the authority to interpret rests wholly or partly on implicit authorization by higher lawmakers, the force of precedent, as I have suggested, does not flow from that alone and is an aspect of our law because of acceptance.

VII. INTERPRETIVE STANDARDS

Our last subject for analysis is the interpretive standards judges use to resolve cases. When judges determine the significance of authoritative constitutional or statutory language or decide the reach of the common law, they employ techniques of reasoning and particular criteria of evaluation that are critical aspects of legal adjudication. Among these standards are notions like: "constitutional language should be interpreted in accord with the intent of those who framed and adopted it"; "penal statutes should be strictly construed"; and "no person should profit from his wrongdoing."

Dworkin's challenge to the whole idea of a rule of recognition rests largely on the place of such standards.⁸⁴ In brief, he claims that these standards are not typically given legal validity by a single authoritative act;⁸⁵ their status rests on more complicated facts of institutional acceptance and consonancy with other materials of the legal system. Dworkin suggests that an explanation of the authority and weight of many interpretative principles defeats any easy distinction between derivative validity and acceptance and shows that no straightforward standard indicates what principles count in the law and for how

83. I do not pause to analyze the intermediate possibility that courts could apply the Constitution, but that other branches, except in enforcing judgments, would not take judicial constructions as authoritative. I discuss the authority of Supreme Court decisions for the political branches in *Constitutional Decisions and the Supreme Law*, 58 U. COLO. L. REV. 145 (1987).

84. See, e.g., TAKING RIGHTS SERIOUSLY, *supra* note 4, at 14-130.

85. I say "typically" because statutes in this country do frequently contain some principles for their own construction.

much.⁸⁶ He claims, moreover, that in respect to these matters, judges do not even employ a commonly shared standard. Each relies on what seems to him or her the soundest approach, the one that best interprets the whole corpus of legal materials. Each judge makes essentially normative judgments; he does not try to ascertain some socially accepted rule and follow it. Here lies the heart of Dworkin's thesis that the criteria of law are normative, not conventional.⁸⁷

Having this sketch in mind is helpful as we consider the status of interpretive standards. I shall concentrate here on interpretative standards in constitutional cases, though, with slight modifications, the conclusions I draw apply to common-law and statutory interpretation as well.

For illustrative purposes, I shall use an interpretive standard that can be drawn from Supreme Court cases establishing that wiretapping and electronic eavesdropping are practices covered by the fourth amendment.⁸⁸ The standard, roughly put, is that the concepts of "search" and "seizure" in the fourth amendment should be flexibly interpreted in light of changing technologies and the evils the amendment was designed to prevent. It is evident that discrepancies in interpretive strategies can yield different conclusions about what the Constitution requires. Justice Black's more rigid approach to practices covered by the fourth amendment, for example, produced dissents in the wiretapping and eavesdropping cases.⁸⁹ Thus the determination of interpretive strategy is an important aspect of judgment about what the law provides.

Whether every standard of interpretation that constrains judges should be characterized as a "legal" standard is doubtful.⁹⁰ Some standards of interpretation, such as that ordinary words should be accorded their natural meaning absent some reason to do otherwise, are general and fundamental to all interpretation of language; but other standards are distinctly legal. Whether standards are distinctly legal

86. See, e.g., *TAKING RIGHTS SERIOUSLY*, *supra* note 4, at 41. According to Dworkin each interpretive principle counts for a decision one way or another, but each does not dictate the decision in every instance to which it applies. Thus, in a common-law case, a court might give some weight to the principle that a person should not profit from his wrongdoing and still allow the wrongdoer to win to his profit. How much weight to assign competing principles in context is an important aspect of adjudication.

87. The account given here is meant to be faithful both to Dworkin's earlier work and to his recent systematic statement in *Law's Empire*, *supra* note 4.

88. *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). That constitutional interpretive standards cannot be excluded from a rule of recognition is emphasized by Richard Kay, who in fact accords them a more prominent place than I do. See Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

89. *Berger*, 388 U.S. at 70, 78-81; *Katz*, 389 U.S. at 364-74.

90. See Soper, *supra* note 5, at 488-98.

or not, so long as judges are bound to follow them in deciding what the Constitution means, the standards need to be accorded some place among ultimate or derivative criteria for determining law. Perhaps general and fundamental standards for interpretation of language are already implicit in the idea that what the Constitution contains is law, but that could not be said for any distinctly legal standards whose status does not derive from the Constitution itself.

In considering the status of interpretive standards, I address the relevance of the Supreme Court's flexible approach to "search" and "seizure" for a new "X-ray vision" device that "sees" clearly through solid walls.⁹¹ We might initially be inclined to say that whatever standards are now prevailing rest on acceptance and are part of the ultimate rule of recognition. But to speak in this manner could be doubly misleading. First, there is no guarantee that most Justices will adhere to the "dominant standards." Each Justice of the Supreme Court will actually employ a set of interpretive strategies that is at least subtly at variance with the strategies of any other Justice. And, as the next section explores, as to some questions the "dominant" interpretive strategy may represent a composite of views. Second, it is an open question how much weight a Justice will accord to a prevailing point of view because it occupies that status. Justices who do adhere to a dominant strategy need not do so because they take any prevailing standard as legally authoritative. A Justice who conforms to a dominant strategy might do so because he or she thinks it is normatively correct, regardless of what other judges now assume or have assumed.

The question of authoritative status is most sharply posed when there is some clear difference in interpretive approach, as might be perceived by a new Justice, Carolyn Gray, who is passing on the "X-ray vision" device and who thinks that Justice Black had the better of the argument in the original wiretapping and eavesdropping cases. We can very roughly imagine four possible positions. Justice Gray might feel constrained to accept prevailing interpretive standards as absolutely binding; she might consider the prevailing interpretive standard to be as binding as a clear line of constitutional precedents; she might suppose that the prevailing interpretive standard carries some weight, but less than would a clear line of precedent; or she might believe that whether a standard is prevailing or not carries no significance, her responsibility being to determine the best set of interpretive standards without deference to what past cases say or the rest of the present Justices think.

91. The device mechanically achieves what Superman has always been able to do.

We can initially rule out the first possibility; all Justices believe it is sometimes appropriate to alter previously prevailing standards of interpretation. At least for many matters we can also rule out the last possibility. Most Justices suppose that it makes *some* difference what prevailing standards are. At least when an issue of interpretive strategy is regarded as close or a Justice is unsure of the correct strategy, he or she is likely to go along with a clear prevailing standard that has received majority support.

Generalizing between the second and third possibilities is complicated by the open-endedness of many relevant formulations of how judges should interpret, by different levels of interpretive standards, and by variations in the degree of firmness with which standards are settled; but we can say that prevailing interpretive standards typically exercise less constraint than clear precedents that establish rules of law. A Justice would feel freer to abandon the flexible approach to new technology in interpreting the fourth amendment than to overrule the cases applying the amendment to wiretapping and electronic eavesdropping. That a standard of interpretation prevails does make a difference, but even such a standard does not bind as strongly as authoritative constitutional or statutory materials or even as strongly as typical precedential rules of law.⁹²

This analysis of standards of constitutional interpretation yields some important conclusions. *The Concept of Law* conveys the idea that the set of ultimate criteria for identifying law might vary in length from a sentence to a paragraph. Trying to state ultimate criteria that account for prevailing standards in constitutional, statutory, and common-law interpretation leads to difficulties in one of two directions. Either aspects of the criteria of recognition are cast in the simple circular and uninformative way that accepted standards of interpretation are part of the law,⁹³ or the standards themselves must be described. In the latter event, the ultimate criteria might stretch to volumes and require constant alteration with every subtle shift in prevailing standards.

Another important conclusion concerns the relation between the prevailing standards and what an official within the system should do.

92. Of course, since one critical question of constitutional law interpretation is how much of precedents on particular issues are to be taken as binding, and how the precedents are themselves to be interpreted, differences and uncertainties about standards of interpretation infect the significance and weight of precedents. Though Justices may generally agree that precedents count as law in some sense, they may differ considerably in their understanding of what that entails.

93. As Dworkin suggests in *A Reply*, *supra* note 4, at 248, Hart's discussion of a possible ultimate rule for international law is unsupportive of simple circular rules of recognition. See *THE CONCEPT OF LAW*, *supra* note 1, at 228-29.

Hart assumes that a sociologist's description of the ultimate rule of recognition will coalesce with the standards a loyal official would employ. But we can see that a follower of Justice Black who thought the majority's approach badly misguided might loyally continue to employ what she regarded as the best interpretive strategy for the fourth amendment even while recognizing that she was in the minority. If we thought a rule of recognition had to be accepted by virtually all officials as binding on all relevant officials, we might at this point say there is no rule of recognition that covers flexible or rigid interpretation of "search and seizure." If, on the other hand, we adopted the more modest notion that a "rule of recognition" can consist of presently prevailing ultimate criteria for identifying law, we might say that the generally accepted flexible approach is embraced by the ultimate rule. But we would then have to concede that the rule in this respect does not sharply constrain those who disagree with the flexible approach.

This point illustrates Dworkin's claim that judges developing complex interpretive strategies are not just seeking to ascertain what standards are now prevailing but what standards are best. However, Dworkin errs in not acknowledging *how* significant it may be for a judge whether an interpretive strategy is prevailing.⁹⁴ The same reasons of coordination that lead judges to join majority opinions that do not precisely represent their own views lead them to adhere to prevailing interpretive standards that are not exactly the ones they would have adopted.

Prevailing interpretive strategies, like precedents, affect the decisions of lower-court judges and nonjudicial officials. As I indicated with respect to precedents, the force of prevailing standards and the extent to which a principle of authoritativeness can be implicitly derived from constitutions and statutes may vary among different kinds of officials. I shall not repeat that analysis here.

VIII. THEORETICAL LESSONS

The main effort of this article has been to apply Hart's theory regarding an ultimate rule of recognition to the United States. The insights generated by this effort allow enrichment of Hart's theory and illuminate some strengths and weaknesses of Hart's conventionalist account. In this final section, I recapitulate my major findings and comment on broader theoretical concerns.

94. *But see* LAW'S EMPIRE, *supra* note 4, at 248.

A. *A Rough Approximation of the Rule of Recognition for
Someplace Within the United States*

This whole exercise has demonstrated the immense difficulty of determining what is the appropriate rule of recognition in the United States. I shall here take the standpoint of a sociologist studying what counts as law within the American legal system and framing a rule of recognition with respect to the highest body that will determine a legal question. With qualifications indicated in the relevant sections, I have concluded that the supreme criterion of law is the amending clause of the federal Constitution, and that within one of our states the ultimate rule of recognition, cast in hierarchical order, is approximately this:

(1) Whatever is in the federal Constitution, that has not lost its legal force and does not derive its present legal force from enactment by a prescribed constitutional procedure, is law;

(2) On matters not clear from the text, the prevailing standards of interpretation used by the Supreme Court determine what the Constitution means,⁹⁵ and Supreme Court decisions interpreting the Constitution establish precedential law;⁹⁶

(3) On matters not clear from statutory texts, the prevailing standards of interpretation determine what congressional legislation means,⁹⁷ and Supreme Court decisions interpreting that legislation establish precedential law;

(4) Prevailing standards of interpretation for common-law subjects determine federal law for those,⁹⁸ and Supreme Court decisions on such subjects establish precedential law;

(5) Whatever is in the state constitution (or whatever was adopted in accordance with an accepted constitution-making procedure), that has not lost its legal force and does not derive its present legal force from a procedure prescribed in the existing constitution, is law;

(6) On matters not clear from the text, the prevailing standards

95. This formulation falls into the vice of circularity noted above. See note 93 *supra* and accompanying text. That vice could be avoided by extensive specification of prevailing standards.

96. I am unsure whether the power to make law by precedent is best folded into interpretive standards generally or treated independently. A more complete statement might have to include the place of precedents established by lower courts on issues not resolved by the Supreme Court.

97. The authority of the legislature itself is not included because that is derivative from the Constitution. I am assuming that most interpretive standards and the authority of precedent in statutory cases are not so derivative.

98. Despite the absence of a federal common law, there may be a "common law" for federal government contracts, for torts committed by federal officers, and for admiralty cases, among others. The federal "common law" in such cases can override conflicting state law.

of interpretation used by the highest state court determine what the state constitution means, and decisions of that court interpreting the state constitution establish precedential law;

(7) On matters not clear from statutory texts, the prevailing standards of interpretation used by the highest state court determine what state legislation means, and decisions of that court interpreting that legislation establish precedential law;

(8) Prevailing standards of interpretation determine the reach of the common law, and decisions of the highest state court establish common-law precedents;

(9) Customs meeting criteria of legal bindingness constitute customary law.

This summary attempts to state the standards of law that officials rely on that are not themselves derivable from some higher legal norm but rest on acceptance. The inclusion of custom here is of minor importance, but it incorporates a point made by Hart: that certain customs may be established in a way that makes them legally binding before a court declares them to be so.⁹⁹ I have not reiterated all the complexities one would need to introduce to meet obvious objections to any formulations made in even this simple a way. The rest of this section, like the preceding sections, sheds some light on those complexities.

B. *More General Possibilities*

This article has demonstrated at least ten possibilities that are omitted or underdeveloped in Hart's account.

The first possibility is that not only may a rule of recognition have gaps (a point Hart does emphasize), but there may also be deep uncertainty for someone tracing the legal status of a norm as to when one ascends above the authority of the last relevant higher legal norm and reaches the relevance of acceptance. Particularly when it has long been assumed that a higher norm does confer legal status on an important norm like a constitutional amendment, one may not know whether conformity with the higher norm remains crucial to the validity of the other norm.

The second possibility, closely related to the first, is that over time in a perfectly stable legal order the point of ultimacy may shift radically, despite the absence of any clear change at any particular stage.

99. THE CONCEPT OF LAW, *supra* note 1, at 44-48, 98. I have omitted custom for federal law, though a custom might arise that would have legal effect in the limited areas of federal common law.

What was once law because adopted by a certain process may *now* be law because it has been so long accepted as law.

The third possibility, tied to the previous two, is that a system may be stable even if officials occupying the same position, say Supreme Court Justices, have variant notions of the point of ultimacy for the authority of some legal standards.

The fourth possibility is that differences in role may sharply affect what ultimate rules of recognition officials actually use. The working rule of recognition for highest court judges may look very different from the working rule of recognition for a police sergeant even when those working rules are fully compatible.

The fifth possibility is that some standards for what counts as law may be inextricable from what has been proposed as law under these standards. The point is clearest with respect to the original Constitution and a rule that what is adopted under the ratification clause is law, or a rule that what the Constitution contains is law; but it is also possible that other officials accept the results of judges' interpretive strategies only because they fall within a widely tolerable range.

The sixth possibility is that as to some standards for authoritative norms, such as state constitutions, negative constraints on what they may provide come from one kind of higher norm, the federal Constitution, while positive endorsement of their status comes from either another higher norm, such as a prior procedure within the state for adopting a constitution, or from acceptance.

The seventh possibility is that the authoritative status of some norms, such as common-law rules and interpretive strategies established by judicial decision, depends *both* on oblique approval by higher norms and on acceptance.

The eighth possibility is that, as to some crucial and ultimate criteria of law, judges are not mainly asking what is generally accepted but are seeking what are the best possible criteria conceived in some other way. This possibility, urged by Dworkin, is most obviously realized with respect to interpretive criteria. This possibility shows that what a sociologist might describe as law within a society might not conform exactly with what any particular loyal official might take as law.

The ninth possibility is that the ultimate rule of recognition may be very long. If judges largely agree on correct interpretive standards but do not agree on a principle that prevailing standards should be followed, a noncircular statement of the ultimate rule may require specification of all relevant accepted standards.

The tenth possibility is that the supreme criterion of law need not

be a part of the ultimate rule of recognition; rather it may be derived from that rule.

We may be confident that these possibilities are not restricted in their importance to the United States. If, for example, we reflected on Hart's own account of English law, we might find that he has not adequately explained the status of the principles courts use to interpret legislation and common-law precedents, that his clean dichotomy between legislative authorization and acceptance is too simple in respect to the status of common-law precedents, and that the present legal authority of ancient statutes rests on their having been accepted so long as law, not on the actual manner of their adoption.

C. *The Virtues of Mixed Conventional and Normative
Accounts of Law*

Some of these possibilities can easily be incorporated into Hart's theory, but others pose serious difficulties. A number of them, the eighth most directly, raise the question whether judges who are seeking to determine the law exhaust the sources of law when they have ascertained whatever clear implications can be drawn from any higher legal norms and from any generally accepted ultimate norms of what counts as law. If we take a simplistic view of Hart's conventionalist account, we might conclude that when the answer these sources provide to a question is not reasonably evident, "the law" does not answer the question. Now, such a view *might* represent a satisfactory approach for a sociologist, but it is hardly adequate for a judge. Judges conceive of themselves as constrained by the law even when no widely accepted social rule includes such a constraint. At least to this degree, an approach with important normative elements provides a more compelling account of an insider's view than the simple conventionalist approach I have just sketched. Whether or not Dworkin's claim that the law provides an answer to every case is correct, and whether or not insiders suppose that the law provides such an answer, an account with critical normative elements can show why officials often consider themselves as legally bound even though no clear derivation from higher norms is possible and no socially established rule indicates they are bound in the way they suppose.¹⁰⁰

An undiluted normative account, however, seems no sounder than a simple conventionalist account for explaining legal interpretation, unless it is rich enough to pay attention to the great importance of

100. An account with normative elements may also handle more comfortably the ways in which higher norms can obliquely support practices without explicitly authorizing them.

shared practices and conventions. As I suggested early in the article, a normative account must build from conventionally accepted standards of what obviously counts as law. Further, even on debatable matters such as interpretive strategies, it does matter what the prevailing view is in our system, and it matters because judges recognize the social advantage of employing shared standards. Prevailing standards, like precedents, ordinarily exert some normative force because they permit coordinated activity by officials and have generated reasonable expectations among citizens. A plausible normative account must accord convention its proper role, and it is difficult to imagine many legal systems for which this role will not be significant. A "descriptive" normative account, one that describes how officials behave, must indicate how far social acceptance does figure in the normative evaluations judges and other officials make; a "prescriptive" normative account must elaborate how far social acceptance should figure in normative evaluations for judges.

In trying to develop a satisfactory account of law that appropriately treats both normative and conventional elements, one can usefully distinguish an outsider's, or sociologist's, view from that of a participant who must actually decide what the law is. It is no coincidence that Hart, while emphasizing the "internal point of view" taken by officials, has been mainly interested in the former and Dworkin the latter. Because convention looms larger in a sociologist's view of law than a participant's, and normative elements are more central for a participant, Hart's focus has led him to stress convention, and Dworkin's focus has led him to concentrate on normative evaluation.

1. *The Sociologist's Account*

I shall start with the sociologist, who is interested in describing. He wants to differentiate law from other social phenomena. For a modern legal system, he wants to identify norms that are part of the system of norms administered by officials and backed by the state's coercive power. His account of a society's law would include all the norms that are undeniably part of this system. Since he cares about norms that are *practically* part of this system,¹⁰¹ his account of the standards by which law is identified would be based on the standards prevailing among the relevant officials. In respect to legal questions about which the relevant officials are uncertain or sharply divided, he

101. An outsider may, of course, be interested in reconstructing the basic values implied by legal materials and showing how practical administration has departed from these. Such an outsider may wish to give a more normative account of what constitutes the law. I am assuming that the typical social scientist has the interests ascribed to the sociologist in the text.

might well say that the law is undetermined or not settled. What has been said so far about this "social fact" account of law is quite close to Hart's theory, but we need to pay attention to some complexities that show that this sociologist's account differs from the simple conventionalist account I sketched a moment ago.

First, we must recognize that a standard for determining law could be a "prevailing standard" without being generally shared, or even shared by a majority. A stark illustration is when a standard is applied by a key group in the center. For a period in the 1960s and 1970s, for example, a minority of Supreme Court Justices thought that communication could be punished by states as obscene only if it appealed predominantly to the prurient interest, was patently offensive, and was utterly without redeeming social value.¹⁰² Some Justices to the "left" thought no speech could be punished as obscene¹⁰³ or that the appropriate standard was more "speech protective" than the three-fold test;¹⁰⁴ some Justices to the "right" thought that the appropriate test was less "speech protective."¹⁰⁵ The "threefold" test was prevailing because its application by the Justices who accepted it determined the outcome of cases, although a majority of Justices did not accept or apply that test.

On more complicated interpretive matters, like the appropriate weight accorded precedent, each Justice may apply an approach subtly different from that of every other Justice. In that event, the "prevailing standard," hard as it would be to formulate, might be a kind of distillation of a number of standards that would not itself track exactly the approach of any single official.

In an extreme case, the prevailing standard might combine elements actually rejected by every single official. Suppose, to oversimplify in a schematic way, that three Justices thought neither element *A* nor element *B* bore at all on whether a norm was law, three Justices thought element *A* was sufficient to make a norm law and that element *B* was irrelevant, and three Justices thought that element *B* was sufficient and element *A* irrelevant. The practical prevailing standard would be that, absent other lawmaking features, norms are law only if they combine elements *A* and *B*, even though this standard is at odds with the standard applied by every Justice.¹⁰⁶

102. See *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

103. See *Memoirs*, 383 U.S. at 424-33 (Douglas, J., concurring); *Ginzburg v. United States*, 383 U.S. 463, 476-82 (1966) (Black, J., dissenting).

104. See *Ginzburg*, 383 U.S. at 497-501 (Stewart, J., dissenting).

105. See *Memoirs*, 383 U.S. at 441-55 (Clark, J., dissenting), 455-60 (Harlan, J., dissenting), 460-62 (White, J., dissenting).

106. Cf. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

Employment of a "prevailing standard" approach would permit the sociologist to inform another person what criteria norms must satisfy to be treated as law within the system, and to predict the outcome of cases as to which application of a prevailing standard is clear.¹⁰⁷ For some genuinely novel issue, like the fourth amendment's application to the "X-ray vision" device, the sociologist might undertake substantial normative elaboration to decide how Justices adhering to given standards would treat this new issue. Insofar as the sociologist engages in a normative appraisal using prevailing standards, his effort will resemble that of actual Justices. But the sociologist is still not concerned with what interpretive standards Justices *should use* or with how they *should decide* genuinely doubtful cases. His task remains descriptive.

Most clients of lawyers are mainly concerned with how the state's coercive power might be applied to their situations, not with how an ideal judge would decide. Although lawyers giving advice are certainly participants in the legal system, something very close to the sociologist's approach is the one they take in advising clients. About subjects as to which no prevailing standard can be identified or the import of existing standards is uncertain, the lawyer as adviser is likely to say that the law is unsettled or unclear.

Beyond the fact that a prevailing standard need not be socially shared, the sociologist's account of law is modest in some other important respects. First, identification of relevant standards does not mean prediction of outcomes will necessarily be easy. Judges who agree on a standard of interpretation often disagree about its application to a particular case, especially when the standard is open-ended. Second, prevailing standards may or may not include direct references to social morality or critical morality or to some vague combination or amalgam of these. There is no reason why an ultimate standard for law cannot include some moral criteria. Third, prevailing standards will shift subtly over time as new cases are presented and Justices change. None of these features is actually contrary to what Hart says, but *The Concept of Law* leaves the impression that the ultimate rule of recognition will be rather stable, will not refer much to moral criteria, and will allow rather clear identification of what counts as law.

A fourth respect in which the sociologist's account is modest is the most important for an investigation of the adequacy of a conventionalist theory of law. The account as I have given it does not assert any particular explanation of why standards are prevailing. Indeed, the

107. Subject, of course, to possible shifts in standards.

inclusion among prevailing standards of standards that are not generally shared already shows that not all prevailing standards need be conventionally accepted, that is, accepted as common standards for officials. But even among shared standards, acceptance by particular officials need not, as I have indicated in section VII, rest on their acceptance by other officials. Suppose that in a particular society virtually everyone believed on religious grounds that Moslem officials should be guided by the Koran in their decisions. Each official might take the Koran as a standard for what counts as law, but not because other officials happen to do so. In an account that is conventionalist in a strong sense, officials apply standards *because* they are accepted as common public standards. The sociologist's identification of widely shared standards does not assure that the standards are accepted by officials because they are regarded in this way.

Hart's development of his "social rule" theory is primarily conceptual; but whether a society could have shared standards that do not rest on a conventional basis is an empirical, not a conceptual, question. I presently believe that in any society, at least any society with a moderate degree of cultural diversity, conventional elements will be very powerful in determining what counts as law; but shared standards, and a fortiori prevailing standards that are not shared, may extend well beyond what is accepted for primarily conventional reasons.

There are various tactics one might adopt to defend the notion that all law is based on convention, in the strong sense of being accepted for conventional reasons or derivable from what is accepted for those reasons. The simplest defense would be to claim that what is not settled by convention does not count as law, whatever other status it might have. This defense would not only sharply cut back on what the sociologist could count as law using the "prevailing standards" approach, it would deny the status of law to standards for determining law that every official uses for nonconventional reasons. That result is too strongly counterintuitive to make this defense plausible.

A second kind of defense is more promising. It concedes that standards for determining law are not all conventionally shared; but it claims that the exclusive source for developing those standards is conventionally accepted materials.¹⁰⁸ This approach is suggested by one reading of Dworkin's famous essay *Hard Cases*.¹⁰⁹ Starting with the agreed-upon materials of the law, *i.e.*, undoubted legal rules and legal institutions, a judge constructs the justificatory theory that best ex-

108. See Postema, *supra* note 5.

109. TAKING RIGHTS SERIOUSLY, *supra* note 4, at 81-130; see also R. SARTORIUS, *supra* note 71, at 181-210.

plains these, and applies that theory to difficult cases. So long as necessary moral and political judgments required to construct the justificatory theory can be drawn from the materials themselves, and the best theory can be determined by "fit" with the materials alone, conventionally accepted materials might be the exclusive source of the standards for identifying law. This theory would be conventionalist only in a relatively weak sense, because it would concede that many prevailing standards for determining law are not themselves conventionally accepted.¹¹⁰

Is such a theory persuasive? Within any legal system, it will be an open question how much the standards for determining law are dictated in one way or another by conventionally accepted rules and practices. Even if one acknowledges that the undoubted legal rules and institutions rest on conventional acceptance, it does not follow that all decisions about standards to use in legal interpretation will flow from these materials. "Independent" moral and political judgments will come into play. That, indeed, is the position that Dworkin himself has consistently taken since *Hard Cases*,¹¹¹ and in his writings he has progressively emphasized the importance of these independent judgments.¹¹² If such judgments matter, official efforts to determine law will not rest exclusively on conventional materials even in this weaker sense.

A third defense of an ultimately conventionalist account is that even though judges may disagree about interpretive standards, and even though these standards may not be derivable from conventionally accepted materials, there may be conventional agreement on how judges should approach interpretive choices.¹¹³ Suppose, for example, that all agree that each judge should try as best he or she can to fit a theory of justification to the clear legal materials. In that event, judges would agree conventionally on their responsibilities. One difficulty about this theory is that the "agreed-upon standard" might be very unilluminating about actual criteria for determining law, since judicial disagreements would be so great. More importantly, perhaps, one could probably find an agreed-upon formulation only by moving to an extreme level of generality — e.g., judges should do what is right — or by using critical vague terms that would obscure genuine differences,

110. In *LAW'S EMPIRE*, *supra* note 4, at 124-30, Dworkin suggests that "soft conventionalist" theories of this sort do not qualify as relevantly conventionalist.

111. See, e.g., *TAKING RIGHTS SERIOUSLY*, *supra* note 4, app. at 340-42.

112. See, e.g., Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 170-71 (1982); *LAW'S EMPIRE*, *supra* note 4, at 255-56.

113. See Coleman, *supra* note 5, at 159.

such as whether judges legitimately inject their own views about moral and political philosophy into decisions. Further, even if judges do agree considerably on how they should approach hard interpretive questions, it is far from clear that they do so for exclusively conventional reasons. In sum, the attempt to preserve conventionalism by turning to the judge's tasks in resolving difficult problems is not convincing.

If we take the sociologist's perspective toward law, we may well preserve a "social fact" approach to law, one that refers to what is actually accepted and used in some sense; but the approach would not be fully conventionalist, that is, it would not claim that all of what is accepted as law is accepted because it has a conventional status.

2. *The Participant's Account*

I turn now to an account of law for a judge or other participant who makes legal decisions. The judge is interested in making a correct normative decision about the law.¹¹⁴ He is concerned with the standards that he should employ, not merely with the standards most judges happen to be using. What are the ultimate criteria of law for him? I shall attend here to a Supreme Court Justice or other judge of a highest court, and I shall disregard whatever principles of deference may exist to the determinations of the political branches, that is, principles that tell judges not to decide for themselves whether a norm is legal but to accept the judgment of someone else.

One possible position, suggested by Hart's analysis, is that what is law for the sociologist is congruent with what is law for the judge. What is unclear is not law until the judges settle a matter; then it becomes law either because judges have the prior authority to settle such things or because what the judges say in fact gets accepted by others as a correct statement of the law. There are two fundamental difficulties with this approach. One, already discussed, is that as they approach hard decisions judges typically do not conceive of the law as "running out."¹¹⁵ The second difficulty is that judges often consider to be dispositive in hard cases the same sorts of "legal" considerations that yield clear answers to easy cases. Judges do not usually conceive of their function as being judicial up to a point, and then legislative. These are the essential points that have made Dworkin's attack on the

114. I am omitting other participatory roles that connect to the judge's role. Starting from the interests of their clients, lawyers seek to persuade judges what standards to adopt. Scholars and other critics attempt, ordinarily from a noninterested perspective, to indicate what judges should do.

115. I believe that judges *sometimes* do perceive the law as running out.

rule of recognition seem so powerful, and they have force even if one does not think the law provides an answer to every case.

Let us suppose that disagreements between judges over interpretive strategies can occur because of differences of judgment over "fit" with the undoubted legal materials, or because of differences of judgment about moral and political philosophy that are not determined by fit. Unlike Dworkin,¹¹⁶ I think it is somewhat misleading for a judge to say "the law" really requires one answer rather than another, if the judge *is aware* that what distinguishes his answer from a competing one is an independent moral or political judgment that is not shared.¹¹⁷ But if the judge thinks the difference concerns adequacy of fit with the legal materials, and all agree that fit is what counts, the judge rightly puts it that the law requires his answer. An account of law might draw such a distinction, but it would not track very well the experience of judges in deciding cases, since judges rarely distinguish precisely the input of independent judgment from fit.

From the judge's point of view, it may be most helpful to regard the standards for determining law as including every relevant standard the judge regards himself as bound to use in answering a legal question. In that event, the standards for determining law may include general standards for evaluative reasoning as well as distinctively legal standards. Since judges, like Justice Black adhering to his rigid fourth amendment approach, may well decide they are legally bound to do things that they know others do not assume they are legally bound to do, it may seem that an adequate account of law must be essentially normative.

Any such characterization, however, is substantially misleading if it implies that convention has little or no role. Officials are bound to adhere to much of what is conventionally established because they have explicitly or implicitly agreed to do so, because the justified expectations of citizens and other officials are based on established practices, and because officials' following established practices usually permits a more efficient resolution of social problems.

As I have suggested, the conventional aspects operate at three levels. What are taken as basic legal materials and institutions are matters of established social practice. A judge who swears to uphold the Constitution means our Constitution; he or she has promised to treat our Constitution and the organs of government created under it

116. See *LAW'S EMPIRE*, *supra* note 4, at 260-63.

117. A person who comes at the problem with different independent answers will hardly be reassured that "the law" requires an answer contrary to his simply because a majority of those who happen to be judges disagree with him.

as authoritative in our legal system.¹¹⁸ Insofar as the basic legal materials and institutions are the foundations for “fit” arguments, convention operates as the ground for much of the normative evaluation of judges. Finally convention operates directly at the level of interpretive practice when judges follow precedents and established interpretive standards that they would not have adopted, or join majority opinions whose approach is not exactly the one they would choose. Exactly how far judges do and should rely on convention is difficult to say, and the right answers would obviously vary for different societies, legal systems, and stages of history. What one can confidently say about our legal system, and probably any modern legal system, is that conventional bases are very important ingredients in determinations of law.

How to conceptualize the view from inside is troublesome. One might say that since the judge is trying to determine the correct answer, and since factors other than convention may be relevant, we have a “normative account” which assigns a subsidiary place to convention. But this seems a little too neat. Suppose judges were trying to determine the correct answers — but they regarded themselves as entirely bound to adhere to what is conventionally established, and they thought that beyond what was conventionally established the law did not constrain them. Then we would have a fully conventional account of law. Suppose a single other normative factor were introduced that in some slight proportion of cases was determinative. Would we then need to shift to a “normative” account of law and away from a “conventional” one? If convention is *almost* entirely determinative of what counts as law, then saying that we have a largely conventional account, qualified by another factor, would seem more apt. If other normative factors are much larger in importance but convention is still absolutely critical, perhaps we can best speak of a mixed conventional and normative account. Whatever the label, we should recognize that the account of law for the inside participant makes existing social practice less decisive for what counts as law than it is for the sociologist’s account.

CONCLUSION

We have seen that Hart’s rule of recognition theory requires substantial supplementation if it is to account for what insiders regard as law. Given the intertwining of judgments about the materials them-

118. Once officials promise in their oath of office to uphold the law, or implicitly undertake to do so by accepting their positions, the direct normative force of convention is supplemented by the normative force of promise.

selves, their moral and political implications, and the judge's independent moral and political assumptions, one needs to acknowledge that the boundaries of law are not the same as the boundaries of what is conventionally accepted. But if Hart's theory requires some revisions, it illuminates critical conventional elements in any satisfactory theory of law for the United States. Its basic outline, with additions and qualifications, remains a powerful explanatory account of how a sociologist might approach the law of a society, and of why an insider accords authoritative status to much that counts as law. Further, Hart's theory is an important beginning toward understanding how convention and normative judgments interact when a judge deals with interpretive techniques and other subtle aspects of law.